ONTARIO
LABOUR RELATIONS BOARD
REPORTS

January/February 2009

Ontario

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**A Bimonthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [2009] OLRB REP. JANUARY/FEBRUARY

**EDITORS: VOY STELMASZYNSKI
LEONARD MARVY**

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Bargaining Unit – Certification – Practice and Procedure – Representation Vote – Stay – After determining the status of one individual, the Board agreed to stay the counting of the ballots, pending its determination of a reconsideration request by the employer concerning the status of the disputed individual – After denying the employer's reconsideration request, the employer asked the Board to continue the stay pending its judicial review application – The Board decided it would be inappropriate to stay the counting of the ballots primarily for practical reasons: if the union were to win the vote, there remained significant litigation, and if they lost the vote, the application would come to an end – Furthermore the application was already significantly delayed and there was no significant prejudice to the employer or employees if the ballots were counted and the Board's decision was later overturned – Matter referred to Manager of Field Services to count ballots

FALLS MANAGEMENT COMPANY AND/OR COMPLEX SERVICES INC. C.O.B. AS CASINO NIAGARA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA.... 56

Bargaining Unit – Certification – Representation Vote – The union applied for certification of the employees in the employer's utilities department – The employer objected to the proposed bargaining unit because it was department-based, but did not propose another bargaining unit and did not provide notice under section 8.1 – The union won the representation vote but the post-vote hearing was adjourned on agreement of the parties when the panel expressed concern about the appropriateness of the bargaining unit – The union filed a second application for certification of the employer's operating engineers – The employer argued that the first application should be dismissed with a bar pursuant to s. 9 because the Board had determined that the bargaining unit was inappropriate – The Board held that applications with fewer than two employees are dismissed under section 9, which requires the Board to have already determined the appropriate bargaining unit – Once section 9 is satisfied, applications can only be dismissed under section 10(2) – The section 10(3) bar only applies to applications dismissed under section 10(2) – The Board

held that the first application should not be dismissed at this time: the Board must first determine the appropriate bargaining unit in that application, and must ensure that those employees have the opportunity to vote – Submissions directed

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Bias - Certification – Construction Industry – Membership Evidence – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 58

Bias – Employment Standards - Practice and Procedure – The employer applied to review two Orders to Pay, arguing that the responding parties were independent contractors and not employees – On the first day of hearing, the applicant left the proceeding before cross-examining one of the claimants despite a warning from Vice-Chair that he did so at his own peril because the claimant was returning to Bermuda and would not be available for cross-examination at a further date – At the next day of hearing, the applicant requested an adjournment because one of the claimants was in Bermuda and unavailable for cross-examination, and because he had only retained counsel three days before the hearing – The Board denied the adjournment request, reminding the Applicant that he had forfeited his right of cross-examination by leaving the hearing early on the previous date; furthermore, the Board found that the Applicant had ample time to retain counsel in a more timely way – Once again the Applicant withdrew from the hearing – The Board concluded the hearing in the Applicant's absence – On the merits of the review, the Board held that both responding parties were employees and enjoyed the protections of the *Employment Standards Act* – One day after the hearing, the Applicant sent a written request for the Vice-Chair to recuse herself – The Board held that a recusal was inappropriate because the Applicant had failed to demonstrate a reasonable apprehension of bias; the grounds for the request involved discretionary procedural rulings or lacked a factual basis – The Board held: (1) the Applicant had not requested the exclusion of witnesses until testimony and cross-examination were completed; (2) as parties, each claimant was entitled to remain in the room during the other claimant's testimony; (3) there was no disadvantage to the Applicant arising from how the hearing was conducted; (4) the Applicant could have challenged witness credibility in argument but withdrew from the hearing – Applications dismissed

DAVID HALPIN; RE MARI-SOPHIA ENCARNACION AND THE DIRECTOR OF EMPLOYMENT STANDARDS... 96

Certification – Bargaining Unit – Charter of Rights and Freedoms – Certification - The IBEW applied to certify employees in the Facilities Project Management Department, one of eleven departments, of Casino Rama – The Employer objected to the bargaining unit because the Union was not registered under section 4(1.2) of the *Gaming Control Act, 1992*, and because the bargaining unit applied for was inappropriate – A majority of the Board held it did not need to determine the first issue in light of its finding on the appropriateness of the bargaining unit – The Board ruled that its general practice is not to certify departmental bargaining units because fragmentation could cause serious labour relations harm – The proposed bargaining unit employees shared a substantial community of interest with the Employer's other employees in terms of Human Resource Services, orientation, pay, benefits, compensation and benefit adjustments, overtime pay, vacation pay, holiday entitlements, shift and scheduling policies, breaks, meals, attendance management, performance reviews, and training and development – The department's employees also intermingled with other employees – The majority held that the Union failed to discharge its onus of establishing that the departmental unit was appropriate – Application dismissed

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Certification – Bias - Construction Industry – Membership Evidence – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 58

Certification – Constitutional Law – Construction Industry – Non-Construction Employer – LIUNA filed two applications for certification (industrial and construction) – The responding party argued that it was a federal undertaking and therefore governed by the *Canada Labour Code*, that its employees were performing maintenance and not repair (hence, not construction) and, because of the nature of its work, that it was a non-construction employer under the Act – The Board held that the federal and provincial governments had reached agreement after 1995 for CN and CP to divest themselves of certain shortline, intra-provincial, rail lines; the work of the employer was "to" the rail lines, and did not pertain to the operation of the lines; therefore, the labour relations of the employer was governed by provincial legislation – The Board found further that the work of the employer was intended to "sustain and maintain" the rail system that would enable the system to operate efficiently; there was no breakdown of the system; and, since there was no "addition to" an existing facility, the work was maintenance and not construction – Finally, the Board ruled that it did not need to determine whether the employer was a non-construction employer, since such an application is premised on the existence of a collective bargaining relationship – Industrial certificate issued

SWIFT RAILROAD CONTRACTORS CORPORATION; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL 131

Certification – Delay – Employee – Status – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was

whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BAY STAR HOMES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1

Certification Where Act Contravened – Construction – Unfair Labour Practice – The Bricklayers and the Labourers both sought automatic certification, alleging that the employer held meetings with its employees and threatened them with job losses in the event the employer was certified – The Board held that equating certification with a loss of employment is a threat to the tenure or security of employment that is inherently coercive and intimidatory – Similarly, subsequent inquiries by the employer regarding contact from the union was part of a process that would lead employees to choose between their employer and continued employment as opposed to the union and unemployment – The Board held that the employer's actions in this case were such that the true wishes of employees could not be ascertained in a second vote – The abrupt end of the organizing campaign, and the content of letters from employees submitted to the Board in response to the unfair labour practice complaints, indicate that the employees made the connection between the union being certified and a loss of their jobs – Applications for certification granted

RIVERSTONE MASONRY INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE TREVOR LOCKYER; DERRICK VAN DEN BERG; NELSON GOWER; JAMIE RUTTER; J. BRUCE BARCLAY; JASON VELDMAN AND MARK KLEYN 120

Charter of Rights and Freedoms – Bargaining Unit – Certification – Certification – The IBEW applied to certify employees in the Facilities Project Management Department, one of eleven departments, of Casino Rama – The Employer objected to the bargaining unit because the Union was not registered under section 4(1.2) of the *Gaming Control Act, 1992*, and because the bargaining unit applied for was inappropriate – A majority of the Board held it did not need to determine the first issue in light of its finding on the appropriateness of the bargaining unit – The Board ruled that its general practice is not to certify departmental bargaining units because fragmentation could cause serious labour relations harm – The proposed bargaining unit employees shared a substantial community of interest with the Employer's other employees in terms of Human Resource Services, orientation, pay, benefits, compensation and benefit adjustments, overtime pay, vacation pay, holiday entitlements, shift and scheduling policies, breaks, meals, attendance management, performance reviews, and training and development – The department's employees also intermingled with other employees – The majority held that the Union failed to discharge its onus of establishing that the departmental unit was appropriate – Application dismissed

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Constitutional Law – Certification – Construction Industry – Non-Construction Employer – LIUNA filed two applications for certification (industrial and construction) – The responding party argued that it was a federal undertaking and therefore governed by the *Canada Labour Code*, that its employees were performing maintenance and not repair (hence, not construction) and, because of the nature of its work, that it was a non-construction employer under the Act – The Board held that the federal and provincial governments had reached agreement after 1995 for CN and CP to divest themselves of certain shortline, intra-provincial, rail lines; the work of the employer was "to" the rail lines, and did not pertain to the operation of the lines; therefore, the labour relations of the employer was governed by provincial legislation – The Board found further that the work of the employer was intended to "sustain and maintain" the rail system that would enable the system to operate efficiently; there was no breakdown of the system; and, since there was no "addition to" an existing facility, the work was maintenance and not construction – Finally, the Board ruled that it did not need to determine whether the employer was a non-construction employer, since such an application is premised on the existence of a collective bargaining relationship – Industrial certificate issued

SWIFT RAILROAD CONTRACTORS CORPORATION; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL 131

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Construction Industry – Bias - Certification – Membership Evidence – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

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SWIFT RAILROAD CONTRACTORS CORPORATION; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL 131

Construction Industry – Non-Construction Employer – The School Board applied for a declaration that it was a non-construction employer – The Board examined the construction work performed by the School Board to answer two questions: (i) was the work done as part of the School Board's activities or the third party's activities, and (ii) if for the benefit of a third party, can one identify any money that the third party paid in exchange for those services – The Board examined some fifteen projects over a three-year period and found that the School Board fell outside the definition of non-construction employer for one project, the Civic Centre – The School Board receives an administrative fee ($30,000) from the Civic Centre for the provision of construction management services – While the School Board shared in this cost proportionally with the three other occupants (Corporation of the County of Essex; Windsor-Essex Catholic District School Board and the Essex Region Conservation Authority), the Board found that the School Board performs work in the construction industry for which it expects, and in fact does receive, compensation from three unrelated persons – Applications dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW, LOCAL 773 .. 65

Construction Industry – Related Employer – Sale of a Business –The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board provided an extensive survey of the history and evolution of the various entities that ultimately became Cadillac Fairview – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – No new company was created and no old company was extinguished – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – Applications dismissed

THE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. and REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795; RE THE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND INTERNATIONAL UNION OF LOCAL PAINTERS AND ALLIED TRADES, LOCAL 557 5

Construction Industry Grievance – Estoppel – Judicial Review – The IBEW sought judicial review of a Board ruling that dismissed two grievances that alleged that certain work was construction and not maintenance, and had accordingly been performed under the General Presidents' Maintenance Agreement as opposed to the provincial ICI agreement – The Board had found that the union's representative had agreed that the impugned projects would be conducted as maintenance, so the IBEW was estopped from claiming relief for the work the Board found to be construction – On judicial review, the Court found the Board's decision was within the range of reasonableness – Application dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LIMITED, ET AL; RE IBEW, LOCAL 353 158

Delay – Certification – Employee – Status – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BAY STAR HOMES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1

Employee – Certification – Delay – Status – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BAY STAR HOMES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 1

Employee Status – Unfair Labour Practice – The union complained that the employer's unilateral transfer of its payroll staff out of the bargaining unit violated ss. 17, 70, 72, 73 and 76 of the Act – The employer's position was that the payroll staff were increasingly engaged in grievance administration, collective bargaining and policy development; in addition, the physical move of the Human Resources department to new premises required the entire staff to work together in an open area where privacy could no longer be guaranteed – The Board held that the union's efforts to grieve the employer's actions were not thwarted – Furthermore, the parties were able to bargain a new collective agreement satisfactory to both sides without a labour disruption – Commenting that the issue could have been handled differently by the parties, the Board nonetheless found no violations of the Act – Application dismissed

CITY OF BELLEVILLE; CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 907 36

Employment Standards – Bias – Practice and Procedure – The employer applied to review two Orders to Pay, arguing that the responding parties were independent contractors and not employees – On the first day of hearing, the applicant left the proceeding before cross-examining one of the claimants despite a warning from Vice-Chair that he did so at his own peril because the claimant was returning to Bermuda and would not be available for cross-examination at a further date – At the next day of hearing, the applicant requested an adjournment because one of the claimants was in Bermuda and unavailable for cross-examination, and because he had only retained counsel three days before the hearing – The Board denied the adjournment request, reminding the Applicant that he had forfeited his right of cross-examination by leaving the hearing early on the previous date; furthermore, the Board found that the Applicant had ample time to retain counsel in a more timely way – Once again the Applicant withdrew from the hearing – The Board concluded the hearing in the Applicant's absence – On the merits of the review, the Board held that both responding parties were employees and enjoyed the protections of the *Employment Standards Act* – One day after the hearing, the Applicant sent a written request for the Vice-Chair to recuse herself – The Board held that a recusal was inappropriate because the Applicant had failed to demonstrate a reasonable apprehension of bias; the grounds for the request involved discretionary procedural rulings or lacked a factual basis – The Board held: (1) the Applicant had not requested the exclusion of witnesses until testimony and cross-examination were completed; (2) as parties, each claimant was entitled to remain in the room during the other claimant's testimony; (3) there was no disadvantage to the Applicant arising from how the hearing was conducted; (4) the Applicant could have challenged witness credibility in argument but withdrew from the hearing – Applications dismissed

DAVID HALPIN; RE MARI-SOPHIA ENCARNACION AND THE DIRECTOR OF EMPLOYMENT STANDARDS 96

Estoppel – Construction Industry Grievance – Judicial Review – The IBEW sought judicial review of a Board ruling that dismissed two grievances that alleged that certain work was construction and not maintenance, and had accordingly been performed under the General Presidents' Maintenance Agreement as opposed to the provincial ICI agreement

– The Board had found that the union's representative had agreed that the impugned projects would be conducted as maintenance, so the IBEW was estopped from claiming relief for the work the Board found to be construction – On judicial review, the Court found the Board's decision was within the range of reasonableness – Application dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LIMITED, ET AL; RE IBEW, LOCAL 353 158

Health and Safety – Judicial Review - Practice and Procedure – The applicant sought review of a Board decision dismissing his complaint under s. 50 of the *Occupational Health and Safety Act* – The Court found the Board's original decision and its disposition of the applicant's multiple reconsideration requests were eminently reasonable – Further, the Board's ruling on the applicant's adjournment request following opening statements was also a reasonable exercise of the Board's discretion – In addition, the applicant failed to explain his six-year delay in filing the application for judicial review – Application dismissed

MOHAMED KHAN; RE ROYAL ALLIANCE AND OLRB 159

Health and Safety – Practice and Procedure – Timeliness – On an appeal of an inspector's order under section 61 of the *Occupational Health and Safety Act*, the appellant faxed its materials to the responding parties within the time required by the Rules of Procedure sent its materials to the Board via regular mail – The package was postmarked February 6, 2009 but the time stamp indicated that it was processed by the Board on the morning of February 13, 2009, making the application one day late – The Board does not have discretion to extend the 30 day timeline prescribed by section 61 – Rule 3.4 defines the "date of filing" as the date a document is "received" by the Board – Regular mail delivered to the Board is received by a shared services office that distributes mail to all government agencies located in the same building as the Board – Since the appellant faxed its materials to the responding parties in a timely manner and mailed the package a week before it was received by the Board, it was reasonable to conclude that the package was "received" by the Board on February 12, 2009 and therefore not late – Although the appellant failed to file its materials with the Board within five days of delivering the materials to the responding parties as required by Rule 6.12, Rule 3.2 permits the Board to shorten and lengthen any time in the Rules – Furthermore, Rule 40.7 permits the Board to relieve against the strict application of the rules as it considers advisable – The responding parties were not prejudiced by the late filing – The Board extended the time under Rule 6.12

KENORA DISTRICT SERVICE BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5911 AND STEVEN BRISCOE, INSPECTOR 111

Judicial Review – Health and Safety – Practice and Procedure – The applicant sought review of a Board decision dismissing his complaint under s. 50 of the *Occupational Health and Safety Act* – The Court found the Board's original decision and its disposition of the applicant's multiple reconsideration requests were eminently reasonable – Further, the Board's ruling on the applicant's adjournment request following opening statements was also a reasonable exercise of the Board's discretion – In addition, the applicant failed to explain his six-year delay in filing the application for judicial review – Application dismissed

MOHAMED KHAN; RE ROYAL ALLIANCE AND OLRB 159

Judicial Review – Construction Industry Grievance – Estoppel – The IBEW sought judicial review of a Board ruling that dismissed two grievances that alleged that certain work was construction and not maintenance, and had accordingly been performed under the General Presidents' Maintenance Agreement as opposed to the provincial ICI agreement – The Board had found that the union's representative had agreed that the impugned projects would be conducted as maintenance, so the IBEW was estopped from claiming relief for the work the Board found to be construction – On judicial review, the Court found the Board's decision was within the range of reasonableness – Application dismissed

JACOBS CATALYTIC INDUSTRIAL SERVICES LIMITED, ET AL; RE IBEW, LOCAL 353 158

Membership Evidence – Bias - Certification – Construction Industry – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 58

Natural Justice – Bias - Certification – Construction Industry – Membership Evidence – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 58

Non-Construction Employer – Certification – Constitutional Law – Construction Industry – LIUNA filed two applications for certification (industrial and construction) – The responding party argued that it was a federal undertaking and therefore governed by the *Canada Labour Code*, that its employees were performing maintenance and not repair (hence, not construction) and, because of the nature of its work, that it was a non-construction employer under the Act – The Board held that the federal and provincial governments had reached agreement after 1995 for CN and CP to divest themselves of certain shortline, intra-provincial, rail lines; the work of the employer was "to" the rail lines, and did not pertain to the operation of the lines; therefore, the labour relations of the employer was governed by provincial legislation – The Board found further that the work of the employer was intended to "sustain and maintain" the rail system that would enable the system to operate efficiently; there was no breakdown of the system; and, since there was no "addition to" an existing facility, the work was maintenance and not construction – Finally, the Board ruled that it did not need to determine whether the employer was a non-construction employer, since such an application is premised on the existence of a collective bargaining relationship – Industrial certificate issued

SWIFT RAILROAD CONTRACTORS CORPORATION; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA ONTARIO PROVINCIAL DISTRICT COUNCIL 131

Non-Construction Employer – Construction Industry – The School Board applied for a declaration that it was a non-construction employer – The Board examined the construction work performed by the School Board to answer two questions: (i) was the work done as part of the School Board's activities or the third party's activities, and (ii) if for the benefit of a third party, can one identify any money that the third party paid in exchange for those services – The Board examined some fifteen projects over a three-year period and found that the School Board fell outside the definition of non-construction employer for one project, the Civic Centre – The School Board receives an administrative fee ($30,000) from the Civic Centre for the provision of construction management services – While the School Board shared in this cost proportionally with the three other occupants (Corporation of the County of Essex; Windsor-Essex Catholic District School Board and the Essex Region Conservation Authority), the Board found that the School Board performs work in the construction industry for which it expects, and in fact does receive, compensation from three unrelated persons – Applications dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE IBEW, LOCAL 773.. 65

Practice and Procedure – Bargaining unit – Certification – Representation Vote – Stay – After determining the status of one individual, the Board agreed to stay the counting of the ballots, pending its determination of a reconsideration request by the employer concerning the status of the disputed individual – After denying the employer's reconsideration request, the employer asked the Board to continue the stay pending its judicial review application – The Board decided it would be inappropriate to stay the counting of the ballots primarily for practical reasons: if the union were to win the vote, there remained significant litigation, and if they lost the vote, the application would come to an end – Furthermore the application was already significantly delayed and there was no significant prejudice to the employer or employees if the ballots were counted and the

Board's decision was later overturned – Matter referred to Manager of Field Services to count ballots

FALLS MANAGEMENT COMPANY AND/OR COMPLEX SERVICES INC. C.O.B. AS CASINO NIAGARA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA.... 56

Practice and Procedure – Bias – Employment Standards – The employer applied to review two Orders to Pay, arguing that the responding parties were independent contractors and not employees – On the first day of hearing, the applicant left the proceeding before cross-examining one of the claimants despite a warning from Vice-Chair that he did so at his own peril because the claimant was returning to Bermuda and would not be available for cross-examination at a further date – At the next day of hearing, the applicant requested an adjournment because one of the claimants was in Bermuda and unavailable for cross-examination, and because he had only retained counsel three days before the hearing – The Board denied the adjournment request, reminding the Applicant that he had forfeited his right of cross-examination by leaving the hearing early on the previous date; furthermore, the Board found that the Applicant had ample time to retain counsel in a more timely way – Once again the Applicant withdrew from the hearing – The Board concluded the hearing in the Applicant's absence – On the merits of the review, the Board held that both responding parties were employees and enjoyed the protections of the *Employment Standards Act* – One day after the hearing, the Applicant sent a written request for the Vice-Chair to recuse herself – The Board held that a recusal was inappropriate because the Applicant had failed to demonstrate a reasonable apprehension of bias; the grounds for the request involved discretionary procedural rulings or lacked a factual basis – The Board held: (1) the Applicant had not requested the exclusion of witnesses until testimony and cross-examination were completed; (2) as parties, each claimant was entitled to remain in the room during the other claimant's testimony; (3) there was no disadvantage to the Applicant arising from how the hearing was conducted; (4) the Applicant could have challenged witness credibility in argument but withdrew from the hearing – Applications dismissed

DAVID HALPIN; RE MARI-SOPHIA ENCARNACION AND THE DIRECTOR OF EMPLOYMENT STANDARDS.. 96

Practice and Procedure – Health and Safety – Judicial Review – The applicant sought review of a Board decision dismissing his complaint under s. 50 of the *Occupational Health and Safety Act* – The Court found the Board's original decision and its disposition of the applicant's multiple reconsideration requests were eminently reasonable – Further, the Board's ruling on the applicant's adjournment request following opening statements was also a reasonable exercise of the Board's discretion – In addition, the applicant failed to explain his six-year delay in filing the application for judicial review – Application dismissed

MOHAMED KHAN; RE ROYAL ALLIANCE AND OLRB... 159

Practice and Procedure – Health and Safety – Timeliness – On an appeal of an inspector's order under section 61 of the *Occupational Health and Safety Act*, the appellant faxed its materials to the responding parties within the time required by the Rules of Procedure sent its materials to the Board via regular mail – The package was postmarked February 6, 2009 but the time stamp indicated that it was processed by the Board on the morning of February 13, 2009, making the application one day late – The Board does not have discretion to extend the 30 day timeline prescribed by section 61 – Rule 3.4 defines the "date of filing" as the date a document is "received" by the Board – Regular mail delivered to the Board is received by a shared services office that distributes mail to all government agencies located in the same building as the Board – Since the appellant faxed its materials to the responding parties in a timely manner and mailed the package a week before it was received by the Board, it was reasonable to conclude that the package was "received" by the Board on February 12, 2009 and therefore not late – Although the appellant failed to file its materials with the Board within five days of delivering the materials to the responding parties as required by Rule 6.12, Rule 3.2 permits the Board to shorten and lengthen any time in the Rules – Furthermore, Rule 40.7 permits the Board to relieve against the strict application of the rules as it considers advisable – The responding parties were not prejudiced by the late filing – The Board extended the time under Rule 6.12

KENORA DISTRICT SERVICE BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5911 AND STEVEN BRISCOE, INSPECTOR 111

Reconsideration – Bias - Certification – Construction Industry – Membership Evidence – Natural Justice – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

FOUR SEASONS SITE DEVELOPMENT LTD.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183.. 58

Reconsideration – Related Employer – The union sought reconsideration of a Board decision in which it declined to make a related employer declaration that arose in the context of a grievance before a private arbitrator – The union argued that in its original decision, the Board had characterized the underlying grievance as dealing exclusively with the issue of contracting out, but the Board failed to acknowledge that the grievance also dealt with personnel of the company doing bargaining unit work which resulted in the loss of regularly scheduled working time for bargaining unit employees – The union asserted that, absent a related employer declaration, it would be deprived of the opportunity to make submissions to the arbitrator regarding the loss of work as a potential violation of the collective agreement – Allowing the request for reconsideration, the Board held that where a union makes out the elements for a common employer declaration and demonstrates the mischief that such a declaration was designed to prevent, such a declaration should issue – Original Board decision varied – Related employer declaration made

NATIONAL STEEL CAR LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7135 115

Related Employer – Construction Industry – Sale of a Business – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board provided an extensive survey of the history and evolution of the various entities that ultimately became Cadillac Fairview – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – No new company was created and no old company was extinguished – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – Applications dismissed

THE CADILLAC FAIRVIEW CORPORATION LTD., CF/REALTY HOLDINGS INC., QUEENSTON ROAD INVESTMENT INC., EASTGATE SQUARE HOLDINGS INC. and REDCLIFF REALTY MANAGEMENT INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1795; RE THE ONTARIO COUNCIL OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AND INTERNATIONAL UNION OF LOCAL PAINTERS AND ALLIED TRADES, LOCAL 557 5

Related Employer – Reconsideration – The union sought reconsideration of a Board decision in which it declined to make a related employer declaration that arose in the context of a grievance before a private arbitrator – The union argued that in its original decision, the Board had characterized the underlying grievance as dealing exclusively with the issue of contracting out, but the Board failed to acknowledge that the grievance also dealt with personnel of the company doing bargaining unit work which resulted in the loss of regularly scheduled working time for bargaining unit employees – The union asserted that, absent a related employer declaration, it would be deprived of the opportunity to make submissions to the arbitrator regarding the loss of work as a potential violation of the collective agreement – Allowing the request for reconsideration, the Board held that where a union makes out the elements for a common employer declaration and demonstrates the mischief that such a declaration was designed to prevent, such a declaration should issue – Original Board decision varied – Related employer declaration made

NATIONAL STEEL CAR LIMITED; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 7135 115

Related Employer – Sale of Business – The Hamilton Police Service Building was undergoing renovations – The Union filed related employer and sale of business applications regarding the City of Hamilton ("City") and the Police Services Board ("PSB") – The City was bound by the Union's provincial ICI Agreement – The Board dismissed the sale of business application because nothing was transferred from the City to the PSB – The Board found that the City and PSB were related employers because: 1) two legal entities existed; 2) although the City and PSB had different principal activities, the City was integrally and inextricably involved in the PSB's construction activities as it approved the PSB budget, maintained and administered the PSB's accounts, prepared the tenders, reviewed the bids, provided its expertise, issued a City vendor number, managed WSIB and insurance issues, handled contract revisions, organized contractor meetings, paid the contractor and was party to the construction contract; 3) the City exercised common control or direction of the construction activities, and four of the seven PSB members were City appointees; 4) there was a potentially valid labour relations reason for making the declaration as the renovations were done with non-union workers constituting a potential erosion of bargaining rights – The Board found, however, that the Carpenters cannot legally obtain the right to represent carpenters in the employ of the PSB, because s. 3(d) of the *LRA* excludes any such employees from the Act, and s. 117 of the *Police Services Act* operates as an additional bar given the Chief's lack of consent – Since s. 1(4) operates to preserve, not extend bargaining rights, and the Union could not obtain bargaining rights in the first place, no relief was granted – The applications were dismissed

CITY OF HAMILTON AND POLICE SERVICES BOARD (HAMILTON); RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 18 45

Representation Vote – Bargaining Unit – Certification – Practice and Procedure – Stay – After determining the status of one individual, the Board agreed to stay the counting of the ballots, pending its determination of a reconsideration request by the employer concerning the status of the disputed individual – After denying the employer's reconsideration request, the employer asked the Board to continue the stay pending its judicial review application – The Board decided it would be inappropriate to stay the counting of the ballots primarily for practical reasons: if the union were to win the vote, there remained significant litigation, and if they lost the vote, the application would come to an end – Furthermore the application was already significantly delayed and there was no significant prejudice to the employer or employees if the ballots were counted and the Board's decision was later overturned – Matter referred to Manager of Field Services to count ballots

FALLS MANAGEMENT COMPANY AND/OR COMPLEX SERVICES INC. C.O.B. AS CASINO NIAGARA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA.... 56

Representation Vote – Certification – Bargaining Unit – The union applied for certification of the employees in the employer's utilities department – The employer objected to the proposed bargaining unit because it was department-based, but did not propose another bargaining unit and did not provide notice under section 8.1 – The union won the representation vote but the post-vote hearing was adjourned on agreement of the parties when the panel expressed concern about the appropriateness of the bargaining unit – The union filed a second application for certification of the employer's operating engineers – The employer argued that the first application should be dismissed with a bar pursuant to s. 9 because the Board had determined that the bargaining unit was inappropriate – The Board held that applications with fewer than two employees are dismissed under section 9, which requires the Board to have already determined the appropriate bargaining unit – Once section 9 is satisfied, applications can only be dismissed under section 10(2) – The section 10(3) bar only applies to applications dismissed under section 10(2) – The Board held that the first application should not be dismissed at this time: the Board must first determine the appropriate bargaining unit in that application, and must ensure that those employees have the opportunity to vote – Submissions directed

GREENFIELD ETHANOL INC.; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA (CEP) 90

Sale of a Business – Construction Industry – Related Employer – The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board provided an extensive survey of the history and evolution of the various entities that ultimately became Cadillac Fairview – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – No new company was created and no old company was extinguished – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – Applications dismissed

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CITY OF HAMILTON AND POLICE SERVICES BOARD (HAMILTON); RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 18 45

Status – Certification – Delay – Employee – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BAY STAR HOMES LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183... 1

Stay – Bargaining unit – Certification – Practice and Procedure – Representation Vote – After determining the status of one individual, the Board agreed to stay the counting of the ballots, pending its determination of a reconsideration request by the employer concerning the status of the disputed individual – After denying the employer's reconsideration request, the employer asked the Board to continue the stay pending its judicial review application – The Board decided it would be inappropriate to stay the counting of the ballots primarily for practical reasons: if the union were to win the vote, there remained significant litigation, and if they lost the vote, the application would come to an end – Furthermore the application was already significantly delayed and there was no significant prejudice to the employer or employees if the ballots were counted and the Board's decision was later overturned – Matter referred to Manager of Field Services to count ballots

FALLS MANAGEMENT COMPANY AND/OR COMPLEX SERVICES INC. C.O.B. AS CASINO NIAGARA; RE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA.... 56

Timeliness – Health and Safety – Practice and Procedure – On an appeal of an inspector's order under section 61 of the *Occupational Health and Safety Act*, the appellant faxed its materials to the responding parties within the time required by the Rules of Procedure sent its materials to the Board via regular mail – The package was postmarked February 6, 2009 but the time stamp indicated that it was processed by the Board on the morning of February 13, 2009, making the application one day late – The Board does not have discretion to extend the 30 day timeline prescribed by section 61 – Rule 3.4 defines the "date of filing" as the date a document is "received" by the Board – Regular mail delivered to the Board is received by a shared services office that distributes mail to all government agencies located in the same building as the Board – Since the appellant faxed its materials to the responding parties in a timely manner and mailed the package a week before it was received by the Board, it was reasonable to conclude that the package was "received" by the Board on February 12, 2009 and therefore not late – Although the appellant failed to file its materials with the Board within five days of delivering the materials to the responding parties as required by Rule 6.12, Rule 3.2 permits the Board to shorten and lengthen any time in the Rules – Furthermore, Rule 40.7 permits the Board to relieve against the strict application of the rules as it considers advisable – The responding parties were not prejudiced by the late filing – The Board extended the time under Rule 6.12

KENORA DISTRICT SERVICE BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 5911 AND STEVEN BRISCOE, INSPECTOR 111

Unfair Labour Practice – Certification Where Act Contravened – Construction – The Bricklayers and the Labourers both sought automatic certification, alleging that the employer held meetings with its employees and threatened them with job losses in the event the employer was certified – The Board held that equating certification with a loss of employment is a threat to the tenure or security of employment that is inherently coercive and intimidatory – Similarly, subsequent inquiries by the employer regarding contact from the union was part of a process that would lead employees to choose between their employer and continued employment as opposed to the union and unemployment – The Board held that the employer's actions in this case were such that the true wishes of employees could not be ascertained in a second vote – The abrupt end of the organizing campaign, and the content of letters from employees submitted to the Board in response to the unfair labour practice complaints, indicate that the employees made the connection between the union being certified and a loss of their jobs – Applications for certification granted

RIVERSTONE MASONRY INC.; RE BRICK AND ALLIED CRAFT UNION OF CANADA; RE TREVOR LOCKYER; DERRICK VAN DEN BERG; NELSON GOWER; JAMIE RUTTER; J. BRUCE BARCLAY; JASON VELDMAN AND MARK KLEYN 120

Unfair Labour Practice – Employee Status – The union complained that the employer's unilateral transfer of its payroll staff out of the bargaining unit violated ss. 17, 70, 72, 73 and 76 of the Act – The employer's position was that the payroll staff were increasingly engaged in grievance administration, collective bargaining and policy development; in addition, the physical move of the Human Resources department to new premises required the entire staff to work together in an open area where privacy could no longer be guaranteed – The Board held that the union's efforts to grieve the employer's actions were not thwarted – Furthermore, the parties were able to bargain a new collective agreement satisfactory to both sides without a labour disruption – Commenting that the issue could have been handled differently by the parties, the Board nonetheless found no violations of the Act – Application dismissed

CITY OF BELLEVILLE; CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 907 36

0492-04-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Bay Star Homes Limited**, Responding Party.

Certification – Delay – Employee – Status – The applicant attempted to revive an application for certification after more than three years of dormancy – The responding party pleaded prejudice and asked the Board to terminate the proceeding – The issue in dispute was whether two individuals who cast ballots in favour of the applicant were in fact the employees of the responding party, or another entity – There had been a third-party production order in 2005 that was apparently only partially fulfilled – The Board held that while the responding party was not responsible for and did not contribute to the delay, neither party should be solely accountable for the passage of time – Since the onus lies on the applicant to produce the challenged employees or otherwise prove its case, the delay worked to its detriment – No further production order will issue – Matter listed for hearing

BEFORE: *Marilyn Silverman*, Vice-Chair.

DECISION OF THE BOARD: January 7, 2009

1. This is an application for certification filed under the construction provisions of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). It was filed on May 4, 2004.

2. Two individuals cast ballots and those ballots have been counted. They were cast in favour of the applicant. The issue in dispute between the parties is whether the two individuals who cast ballots were employees of the responding party in the bargaining unit on the application filing date. The responding party asserts that they were not its employees but the employees of another entity.

3. However, the issue for consideration in this decision is whether the Board should terminate this application.

4. The matter was scheduled for hearing on January 13, 2005. At that hearing, the Board (differently constituted) directed another entity Visions Personnel Services Inc ("VSPI") to produce documents. VPSI is an entity whom the responding party claims is the real employer of the individuals who cast ballots. The principal of that company apparently agreed to do so. The matter was referred to the Registrar to schedule for hearing.

5. The file contains a notation that the parties were to contact the Registrar to arrange for hearing dates. Nothing occurred in the file for over three years.

6. On March 10, 2008 the applicant requested that the matter be re-listed for hearing. The responding party advised that to its understanding, the matter had been terminated. The applicant renewed its request and the Registrar scheduled the matter for hearing. I convened a teleconference to deal with this issue and at that time the applicant was provided with an opportunity to respond to the submissions of counsel for the responding party which had been filed on October 6, 2008. The applicant has done so. After reviewing those submissions I asked for a reply from the responding party, which was filed. I have now carefully considered the positions of each of the parties.

7. The applicant asserts that the Board does not have the discretion to terminate an application for certification, but that if it does, it should not do so in this case.

8. On the scope of the Board's jurisdiction, the applicant says that the ability to terminate must arise from the statute. It reviews the certification provisions of the Act, specifically sections 7 and 10, and asserts that the Board is restricted to dismissing or certifying an application for certification. The applicant also refers to cases that raise the question of whether the Board has such jurisdiction, but have not expressly concluded the issue on the basis of alleged delay or abandonment.

9. As regards the Board's jurisdiction to terminate an application for certification, I am satisfied that I have that jurisdiction. Section 86(2) (b) expressly contemplates the Board's ability to do so:

> **86.** (2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,
>
> …
>
> (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

10. Further there is nothing in the Act that prohibits the Board from terminating an application for certification. Rules 6.13 (dealing with applications generally) and Rule 24.3 (dealing with construction applications for certification) specifically provides the Board with this option:

> **6.13** The Board will not process an application that fails to comply with Rules 6.10 or 6.11 or 6.12 and the matter will be terminated.
>
> …
>
> **24.3** An applicant must verify in writing that it has delivered the application and other material as required by these Rules by filing a Certificate of Delivery not later than two (2) days after filing the application with the Board. The Board will not process an application that fails to comply with this Rule and the matter will be terminated.

11. Further, the Board has done so in *Nor Eng Construction & Engineering Inc.*, [2003] O.L.R.D. No. 3842 (Nov. 6, 2003) where the application was not filed in the manner required by the Board's Rules.

12. As regards whether the Board should terminate the application for certification in this case, the responding party asserts that the applicant has not provided any explanation for the delay of over three years and asserts further that the responding party is prejudiced should the Board allow this matter to proceed. It relies on the decisions in *K.J. Beamish Construction Services Ltd.* [2007] OLRB Rep. Jan./Feb. 116 (Jan. 17, 2007) and *Kaitlin Group,* [2003] OLRB Rep. Jan./Feb. 80 (Jan. 21, 2003).

13. The responding party argues that it is unreasonably and irreparably prejudiced where it must engage in an argument over who has day to day control over employees. It asserts that there is no difference between that inquiry and a status dispute from the perspective of the effect of the passage of time on the memories of the witnesses for work performed four years ago.

14. In *Beamish, supra,* an application for certification filed in 1998 was not disposed of. Another application was filed in 2006. The Board dismissed the 1998 application as abandoned on the basis of the lengthy delay. It imposed a discretionary 6 month bar. A fundamental reason expressed by the Boards for dismissing the 1998 application was the prejudice inherent in such a long delay. The witnesses would have to testify as to work performed on a specific day many years before.

15. The Board noted that the onus was on the applicant union to explain the reason for the delay and how the problems associated with it could be overcome. In the absence of an acceptable reason for the delay, the Board dismissed the application.

16. The applicant distinguishes the decision in *Beamish, supra,* on the basis that the delay was longer, the number of employees, more and the nature of an examination of the relevant evidence would require more recall of events long since passed.

17. The applicant argues that the Board should not exercise this discretion on the facts of this case. The applicant contends that the responding party could have asked that the matter be re-listed were it concerned about the passage of time and the inherent prejudice. It relies on the decision in *The Great Atlantic & Pacific Company of Canada Limited,* [2001] CanLII 19889 (Oct. 9, 2001) and highlights the difference between delay in advancing versus commencing a proceeding. In the latter case, the party opposite does not know that a proceeding exists and its nature; but in the former the responding party is aware and no surprise is occasioned by the delay.

18. The applicant specifically relies on the statements made in paragraphs 10 and 11 of *The Great Atlantic & Pacific Company of Canada Limited,* [2001] CanLII 19889:

> 10. Turning now to the argument that the Board ought to dismiss the application for delay, counsel for the Carpenters acknowledged that the Board has rarely entertained such arguments. The Board is more accustomed to considering arguments about delay between the time an applicant knows or ought to have known about the facts giving rise to the claim and the actual commencement of the proceedings. In the Board's view, the cases around delay in bringing proceedings are not helpful. The Board has typically been concerned about prejudice to parties, and prejudice to the speedy resolution of labour relations matters if an applicant delays unduly in advising the party opposite that he or she is aggrieved and intends to bring a proceeding. Delay in advancing a proceeding does not carry the same prejudice. The party opposite already knows that a proceeding has commenced, and the nature of that proceeding.
>
> 11. Counsel for the Carpenters submitted that he assumed the first application was "dead" when A&P did not advance it, and that view was reinforced when the second application was brought. In the Board's view, it was not reasonable for counsel to make such an assumption. Proceedings brought to the Board are typically disposed of one way or another, even if only by way of a sine die adjournment that terminates the proceedings when one year passes. In any

> event, counsel did not assert that he or his client had taken any steps in reliance on that assumption.

19. The applicant further relies on *B. Gottardo Construction Ltd.,* 2008 CanLII 22500 (May 9, 2008). In that case, the Board found that, where all the parties agreed to adjourn indefinitely, it is not open to any of them to rely on the passage of time. The Board in that case relied on an earlier decision in *Menkes Development Inc.,* [1989] O.L.R.D. No. 2097 where the Board held that delay works to the detriment of the applicant, and where the parties agree to adjourn, one party cannot later rely on the passage of time to request that the matter be dismissed or terminated. Further the applicant asserts that there is a distinct determination required in this case and not, as in *Beamish*, the requirement for evidence on what certain persons were doing on a specific day.

20. The applicant argues that the application was never withdrawn or settled nor did the Board advise the parties that a termination would result if no action was taken and therefore afford an opportunity for the applicant to act.

21. Further the applicant contends that the responding party did not comply with the Board's production order. Apparently, VPSI produced some of the requested documents but not all. The applicant says that the responding party cannot rely on its own failure, or the failure of a third party to produce, as a reason to terminate this application.

22. In the circumstances of this case, I am of the view that the matter should be relisted. Although this is not a case where there was an agreement to adjourn, neither is it a case where one party should be solely held accountable for the passage of time. I agree with the responding party that it was not responsible for nor did it contribute to the delay. The suggestion by the applicant that the responding party was expected to do something so as to facilitate further production from a third party is unwarranted. The applicant wanted the production of documents and it was the applicant's onus to pursue that. However, neither party pursued the matter. There is of course no reason why in these circumstances the responding party would do so, but the consequence is that the matter remained outstanding.

23. The substantive case is about whether two individuals who cast ballots were employees of the responding party or of another entity. In terms of prejudice, the applicant has the onus of producing these employees or of proving its case in some other manner. The passage of time works largely then to the applicant's detriment.

24. The matter is therefore referred to the Registrar to schedule one day of hearing. As to any production of documents that the applicant says it did not obtain from VPSI and now says it requires, it is too late to renew the request for production from a third party when it took no steps to get better production at the time it received some production from VSPI. The applicant must have all its witnesses present and prepared to give evidence on that first day of hearing. The panel hearing this application can determine how next to proceed.

25. I remain seized to deal with this application, if convenient to the Registrar.

1732-06-R; 1811-06-R; 2869-06-R International Union of Painters and Allied Trades, Local 1795, Applicant v. **The Cadillac Fairview Corporation Ltd**., CF/Realty Holdings Inc., Queenston Road Investment Inc., Eastgate Square Holdings Inc. and Redcliff Realty Management Inc., Responding Parties; International Union of Painters and Allied Trades, Local 1795, Applicant v. The Cadillac Fairview Corporation Ltd., CF/Realty Holdings Inc., Centre Mall Holdings Inc., Redcliff Realty Management Inc. and Kenilworth Avenue Investment Inc., Responding Parties; The Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied Trades, Local 557, Applicant v. The Cadillac Fairview Corporation Limited, Responding Party.

Construction Industry – Related Employer – Sale of a Business –The union alleged that Cadillac Fairview was bound by the provincial collective agreement because it was related to, or had purchased the business of, Cadco – The Board provided an extensive survey of the history and evolution of the various entities that ultimately became Cadillac Fairview – The Board found that, notwithstanding the numerous amalgamations, Cadillac Fairview continued to assemble and develop land while Cadco continued its existence as a general contractor – As there was no erosion of bargaining rights, the Board exercised its discretion not to grant s. 1(4) relief – No new company was created and no old company was extinguished – The Board also held there was no sale of business because no physical assets or employees were transferred to the employer when Cadco shut down – Applications dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *A.M. Minsky, Laurie Kent* and *George McMenemy* for the applicant; *Michael D. Failes, Sandra Hardy* and *Geoffrey R. Ryans* for The Cadillac Fairview Corporation Ltd.; *Brian Mulroney* for Centre Mall Holdings Inc.

DECISION OF THE BOARD: January 20, 2009

1. These applications all involve the relationship between the International Brotherhood of Painters and Allied Trades and its Locals and District Council in Ontario (the "Painters") and The Cadillac Fairview Corporation Ltd. ("Cadillac Fairview"). Acting as intervenors are certain other businesses that purchased shopping plazas from Cadillac Fairview who are responding parties in other applications. The hearings in those applications have been delayed pending the outcome of these applications.

2. The relationship between the Painters and Cadillac Fairview is said to arise from two documents each called a "Working Agreement" between the Toronto Building Trades Council (now the Toronto-Central Ontario Building Trades Council) and Cadco Construction (York) Limited ("Cadco (York)") and Cadco Contracting Limited ("Cadco Contracting") (known collectively as "Cadco"). I have already issued one substantive decision in which I found that, on the day that each Working Agreement was executed, the document constituted a valid recognition agreement between Cadco-York or Cadco Construction and the affiliates of the Toronto Building Trades Council, including the Painters Union. The Painters assert that this led to Cadco becoming bound to the Painters and Glaziers' Provincial Collective Agreements. Assuming that to be the case, the issue at this stage is whether or not Cadillac Fairview is or should be declared to be bound to the Painters and Glaziers' Provincial Collective Agreements.

3. The applicant Union asserts that it is so bound on two bases. It claims that Cadco was bound to the Working Agreement and, after 1978, to the Painters' Provincial Collective Agreements and that the Board should make a declaration pursuant to subsection 1(4) that Cadco and Cadillac Fairview are, for all purposes of the Act, one employer. In the alternative, it asserts that there was a sale of business from Cadco to Cadillac Fairview.

4. Cadillac Fairview takes the position that it is not bound to the two Painters' Collective Agreements. It agrees that the statutory pre-conditions of subsection 1(4) have been met, i.e. that Cadco and Cadillac Fairview carry on associated or related businesses or activities under common control and direction. It asserts the following "defences":

> (1) the Painters, through their agent, the Toronto Building Trades Council, did not properly acquire bargaining rights as there was never any intention to hire painters or glaziers and in fact, no painters or glaziers were ever hired by either Cadco or Cadillac Fairview;
>
> (2) the Union had abandoned its bargaining rights for Cadco before 1978 and for both Cadco and Cadillac Fairview after that time;
>
> (3) the Board should not exercise its discretion to grant relief under subsection 1(4) as Cadillac Fairview, or more properly its predecessors, were pre-existing businesses that were not bound to the Working Agreement or the Collective Agreements and never became bound to them;
>
> (4) there was no sale of business from Cadco to Cadillac Fairview.

5. This case took a very long time to litigate. I heard from 26 witnesses who, aside from their oral evidence, identified two bankers' boxes full of documents. Much of this evidence concerned Cadillac Fairview's assertion of abandonment or its assertion that the Painters had not acquired valid bargaining rights through the Building Trades Council Working Agreement. This decision does not reflect the length of that evidence, and I do not refer to much of it, as I conclude that the applications can be determined on the basis of the last two issues cited above. In the end, I conclude that it would not be appropriate for the Board to exercise its discretion under subsection 1(4) and that there has been no sale of business from Cadco to Cadillac Fairview or to any other employer party. As a consequence, these applications are dismissed.

History of Cadillac Fairview

6. Most of the relevant events in this case occurred in the 1960's through to the 1980's. The temporal distance between these events and the hearing, aside from fuelling Cadillac Fairview's abandonment argument, meant that there were some details that were simply not available. Certainly, many relevant witnesses were not available. This does not, however, have a significant effect on the facts that I find to be of significance in this decision.

7. Cadillac Fairview is the result of a combination of two businesses. The first was carried on by a corporation called Cadillac Development Corporation Limited. This business was led by Mr. Ephraim Diamond and others. They had earlier commenced a different construction and development

business in the residential sector of the construction industry and were engaged in subdivision development in the Toronto area through various corporations. In the 1960's, they decided to commence a different business developing commercial projects. Cadillac Development Corporation Limited was to be the corporate vehicle for carrying on the commercial developments. The earliest recorded date of its existence in the evidence is January 1, 1965, the date of an amalgamation that "continued" Cadillac Development Corporation Limited as a corporation in Ontario. David Hendley, Senior Vice-President of the shopping centre group with Cadillac Fairview from 1971, said that in 1974 (the time of the amalgamation with Fairview) Cadillac Development's main focus was the construction of office buildings and some shopping plazas.

8. The principals of Cadillac Development also incorporated a series of two corporations to carry on the business of a general contractor. Cadco (York) was incorporated June 20, 1968. For reasons not in evidence, its role was replaced by a second corporation, Cadco Contracting, which was incorporated March 26, 1973. In fact, Cadco (York) was dissolved January 5, 1978. It appears that one corporation simply replaced the other.

9. On March 24, 1971 Cadco (York) executed a Working Agreement with the Toronto Building Trades Council, which was the subject of a decision in these applications dated September 24, 2007. After Cadco (York) was replaced by Cadco Contracting, the latter corporation signed a Working Agreement on March 29, 1973 (three days after its incorporation). Cadco operated as a general contractor performing exclusively or primarily work for Cadillac Development Corporation Limited. This relationship is described more fully below.

10. In 1974, discussions took place between the principals of Cadillac Development and of The Fairview Corporation Limited. Fairview was a competitor that was also a compatible partner. Fairview came into existence sometime before 1969. The earliest record indicates that it was "continued" as a corporation by virtue of an amalgamation on March 1, 1969. David Hendley testified that Fairview had a significant number of shopping centres and had also developed a number of mixed-use projects.

11. On May 31, 1974, Cadillac Development and The Fairview Corporation Limited were amalgamated, along with six other corporations (all of which had been incorporated between 1953 and 1961) pursuant to the *Ontario Business Corporations Act* into a single corporation and continued in business as The Cadillac Fairview Corporation Ltd. The six other corporations were not the subject of evidence and appear to have been simply asset-holding or shareholding corporations.

12. On February 29, 1976 The Cadillac Fairview Corporation Ltd. was amalgamated with The Fairview Corporation of Canada Limited. Some witnesses described this as "Cadillac Fairview No. 2", although it is not apparent to me why that is so. The parties also filed subsequent articles of amalgamation with other corporations dated July 31, 1996 (with Cadillac Fairview Urban Properties Inc.), November 3, 1997 (with Toronto-Dominion Centre Limited and Toronto-Dominion Centre West Limited) and May 8, 2000 (certain numbered corporations). Certain other corporations were incorporated, apparently simply to hold assets (C.F./Realty Holdings, Centre Mall Holdings Inc. and so on). Clearly, however, the business was operated as a single integrated enterprise.

13. Cadco did not carry on as part of the Cadillac Fairview operation. The business was wound up in 1981 or 1982 and the corporation was dissolved April 18, 1991. The evidence about the

relationship between Cadco and Cadillac Development Corporation Limited and later Cadillac Fairview is therefore a relationship that existed from 1968 or so until 1982.

14. The Cadillac Fairview business was carried on in an integrated and organized fashion. James Bullock (with Cadillac Fairview from 1977 and President of Cadillac Fairview shopping centres from 1981 to 1987 and finally President of the U.S. and Canada Group from 1987 to 1991) said the business was carried on in four primary groups: shopping centres, the "urban group" (mixed use and offices), land and housing developments, and industrial developments. He only knew of the work of the shopping centre group in detail. All of these four were operating divisions of the business. All four reported through a chain of reporting with the president or vice-president of the division who in turn reported directly to the President or on occasion to the Chief Executive Officer (Mr. Diamond) of Cadillac Fairview. Cadco functioned as a kind of fifth operating division. Indeed, one organizational chart refers to the "commercial design and construction division" that obviously includes the work of Cadco. It too reported directly to the President.

15. Cadco was operated by two individuals. Cadco (York) was operated by Harold Fealdman and after the amalgamation with Fairview, by Mr. Fealdman and Frank Barrie (who came from the Fairview organization). The first directors of Cadco (only documents for Cadco Contracting are available) were the directors and principals of Cadillac Development Corporation and later Cadillac Fairview. They were replaced over time by other senior officers of Cadillac Fairview. Messrs. Fealdman and Barrie were appointed directors from 1976 until they left the company. However, all of the day to day work of Cadco was carried on by Mr. Fealdman and Mr. Barrie. The presence of the principals of Cadillac Fairview as directors of the corporation was for purposes of integration and control, and was consistent with the manner in which all of the corporations that came within the Cadillac Fairview organization were structured. Mr. Fealdman's duties were exclusively for the Cadco operation. Mr. Barrie may have also had responsibilities with the "urban group".

16. Cadco operated as a general contractor for some of the work done by the Cadillac Fairview organization. It is not possible to reconstruct how much work it did. Mr. Bullock believed that it had acted as general contractor of four or five shopping plazas and one office building at 1200 Finch Avenue West in 1974. However, his time with Cadillac Fairview began in 1977. He did not believe that it performed any "third party work", that is, work as a general contractor for an arms-length customer not related to Cadillac Fairview. Later documents from Cadco implied that it might have done so, but nothing turns on this. Its sole reason for existence was to perform the work of general contractor for Cadillac and Cadillac Fairview. At no time did Cadco perform all of the general contracting work for all of Cadillac Development or Cadillac Fairview's projects. Where Cadco was not the general contractor, Cadillac Fairview constructed a new project by contracting with a general contractor to perform all construction work. The three general contractors named by Messrs. Bullock and Hendley were Jackson Lewis (now Aecon), Ellis-Don and PCL. There may have been others, but they could not remember them.

17. Sometime in 1981, Cadillac Fairview decided that it would no longer operate Cadco. The high (indeed astronomical) interest rates of the time and the low profit margins to be obtained from a general contracting business made the business an unattractive one. Mr. Bullock said that Cadillac Fairview found that the services of a general contractor could be efficiently bought in the marketplace and Cadillac Fairview decided that that is how it would carry on business in the future. Cadco completed the projects on which it was engaged in 1981 sometime in early 1982 and closed down its operations as it completed those projects. Mr. Fealdman was transferred to another position involving

other duties in Cadillac Fairview's American operations. Mr. Barrie retired. Two project managers employed by Cadco, Fred Keaden and Ted Sorren, were transferred into positions involved in the operating of existing projects. In the words of David Hendley, they found that their skills did not meet the responsibilities of the positions into which they had been assigned, and both left within a year.

18. The evidence is not clear as to how many, if any, direct employees Cadco had. Mr. Fealdman and Mr. Barrie likely received paycheques from Cadillac Fairview. Project managers and onsite employees were likely paid by Cadco (although Mr. Hendley could only guess at that). The number of sites on which employees were engaged was small, since generally Cadco contracted out all of the work on a project to trade subcontractors. To the extent that direct employees were employed, they would likely have been supplied by the hiring halls of union affiliates of the Building Trades Council. The general belief of Cadillac Fairview's witnesses, based on limited knowledge, was that Cadco never hired any painters or glaziers. No evidence was filed by the Union to suggest that Cadillac Fairview had done so.

19. During the time that Cadco was closing down, there was an exchange of correspondence between the then counsel for the Toronto-Central Ontario Building Trades Council (not counsel who acted for the applicant in this proceeding) and Cadco. In response to an inquiry by counsel for the Unions, Mr. Barrie of Cadco stated:

> "As I explained to you on the telephone it is the intent that Cadco Contracting will complete whatever works they have in hand at the moment under the terms of the agreement stated above. For business reasons it has been decided that for the immediate future Cadco will not undertake any new construction work for their own or anyone else's account and therefore will not then have any employees after present works have been completed and therefore the issues of unfair practices and maintaining satisfactory working conditions, etc. will not arise.
>
> Should it be decided, in the future, that Cadco will again enter the construction field then discussions can take place at that time regarding a 'Working Agreement' similar to that entered into in 1973. Until that takes place, if it takes place, Cadco will have no employees and therefore the conditions of the present agreement will become redundant.
>
> Cadco will continue to honour the existing agreement until the completion of present work at hand has been attained."

In response, counsel for the Trades Council addressed a letter to Cadco stating:

> "...
>
> Since, for the immediate future, Cadco Contracting Limited will not undertake any new construction work, the Council takes the position that Cadillac Fairview Corporation Limited, as a company related to Cadco Contracting Limited, under provisions of the Ontario Labour Relations Act, is bound by the terms and conditions of the Working Agreement between this Council and Cadco Contracting Limited.
>
> Yours very truly,

Alexander J. Ahee"

In fact, the Toronto-Central Ontario Building Trades Council took no action after that time, nor did any of its affiliates with respect to the Working Agreement with Cadco until this application was filed in 2006.

20. After Cadco was wound up, Cadillac Fairview continued to develop land and buildings. While other general contractors may have been engaged, Jackson Lewis, Ellis-Don and PCL were the only ones mentioned by any witness. Counsel for the Union argued that these were all "unionized general contractors" and that the Building Trades Council was entitled to assume that Cadillac Fairview was complying with obligations under various collective agreements. No doubt, that statement would have been a surprise to Ellis-Don before 1990 (see *Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147) and I have no evidence to suggest that this is necessarily true for all of the trades who were affiliates of the Toronto Building Trades Council with respect to the other two contractors.

21. However, Messrs. Bullock and Hendley agreed that all on-site labour during the construction phase of a project was required to be represented by one of the Building Trades unions. Both said that it was a poor business decision to mix union and non-union trades on the same site as this would have a disruptive effect on working harmony on the site. This rule applied to tenants during the initial construction as well, and for the same reasons. Both witnesses denied that they were aware of any suggestion that Cadillac Fairview was under any obligation to use a unionized general contractor, or had formed any belief that it was, until a 1996 grievance brought by the United Brotherhood of Carpenters and Joiners of America. Since that time, Cadillac Fairview has concluded that it is bound to the Provincial Collective Agreement of the Carpenters Union, the Labourers International Union of North America, and the International Union of Bricklayers and Allied Craftworkers. This conclusion was based on the fact that at some time in the past, an officer of Cadillac Fairview or a predecessor had executed a voluntary collective agreement with a local union of each one of the three. Mr. Hendley testified that Cadillac Fairview's choice of general contractor was based on its assessment of the relative expertise of possible bidders, their available resources, the quality level of the work they performed and their ability to keep to a schedule and a budget. If all three of the general contractors were bound to collective agreements, that was, in Mr. Hendley's and Mr. Bullock's opinion, merely a coincidence.

22. Much of the evidence in this case was taken up with what happened in the 1980's and 1990's, as well as the early years of this century before the applications were filed. Evidence from before that time was simply not available. I do not propose to examine it in any detail. Cadillac Fairview called witnesses to describe work done by employees of Cadillac Fairview in various properties in an attempt to demonstrate that they performed construction work and that the Painters Union was or should have been aware of this work. Several mall managers were called to describe the contracting out of work, particularly glazing work in plazas outside the Toronto area, that had been done by non-union contractors. The Union called evidence to attempt to demonstrate that the Union did not know of such work, or regarded it only as maintenance work or that it was work on the boundary between construction and maintenance. They also called evidence to suggest that the Union believed that Cadillac Fairview was bound to the Provincial Collective Agreements and was acting in accordance with that belief.

The Related Employer Application

23. The first issue raised by these applications is whether or not the Board should exercise its discretion to issue a declaration under subsection 1(4) or not. Cadillac acknowledged from the outset that Cadillac Fairview and Cadco carried on associated or related businesses or activities under common control and direction for the duration of their mutual existences. Cadco was completely integrated into the operation of Cadillac Fairview, and its only real purpose was to perform work for the development operations of Cadillac Fairview. In 1971 and 1973, both Cadco and Cadillac Developments existed. Cadco's entire business was construction work. Cadillac Developments, to the extent that it engaged in construction work at all, did so when it engaged a general contractor for the construction of certain of its construction projects.

24. The Board has consistently refused to exercise its discretion in favour of an applicant where, on the date a voluntary recognition agreement was entered into, the principals of the employer party signing the agreement also operated a pre-existing business engaged in construction activities. That principle has been enunciated in a number of cases: *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844; *Mandic Brothers Limited*, [1982] OLRB Rep. May 693; *B & M Millwork Ltd.*, [1991] OLRB Rep. Apr. 438; *Gerald Davidson Plumbing and Heating*, [1984] OLRB Rep. Mar. 462; *Capricorn Acoustics and Drywall*, [1986] OLRB Rep. Mar. 308; *Ferretti Forming*, [1996] OLRB Rep. Feb. 66; *Landmark Contracting Ltd.*, [1990] OLRB Rep. June 660, and *Fruehauf Canada Inc.* [2007] O.L.R.D. No. 4092 (Oct. 3, 2007). Essentially, the Board will exercise its discretion under subsection 1(4) to protect existing bargaining rights from erosion. There can be, by definition, no erosion of bargaining rights where a pre-existing business continues to do what it had always done before the unionized company became bound to a collective agreement or to bargaining rights and continues to do so afterwards.

25. This was not really a point of dispute between the parties. Counsel for the Painters Union argued that it was precisely because of that well-known policy concerning the exercise of the Board's discretion that he did not seek relief against Cadillac Developments. Rather, he sought relief against Cadillac Fairview, a corporation created after Cadco had executed the two Working Agreements.

26. I do not accept that there is a distinction to be drawn between Cadillac Developments Corporation Limited and the Cadillac Fairview Corporation Limited. On the simplest level, the transaction in 1974 was an amalgamation. In 1974 subsection 197(4) of the *Business Corporations Act* provided:

> **197.** (4) Upon the date set forth in the certificate of amalgamation,
>
> (a) the amalgamation becomes effective and the amalgamating corporations are amalgamated and continue as one corporation under the terms and conditions prescribed in the amalgamation agreement;
>
> (b) the amalgamated corporation possesses all the property, rights, privileges and franchises and is subject to all liabilities, contracts, disabilities and debts of each of the amalgamating corporations;
>
> (c) the issued capital of the amalgamated corporation is, subject to the decrease provided for in subsection 3 of section 196, equal to the

> aggregate of the issued capital of each of the amalgamating corporations immediately before the amalgamation becomes effective; and
>
> (d) the articles of incorporation of each of the amalgamating corporations are amended to the extent necessary to give effect to the terms and conditions of the amalgamation agreement.

In *R. v. Black & Decker Manufacturing Co. Ltd.* (1974) 43 D.L.R. (3d) 393, the Supreme Court of Canada dealt with a very similar provision in the *Canada Business Corporations Act* as follows:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the *Act*, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition" - Shorter Oxford English Dictionary. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; (ii) the statement in s. 137(13)(b) that the "amalgamated company possesses all the property, rights ...". If corporate birth or death were envisaged, one would have expected to find, in the statute, some provision for transfer or conveyance or transmission of assets and not simply the word "possesses", a word which re-enforces the concept of continuance; (iii) letters patent of amalgamation are obtained for the purpose of "confirming the agreement" (s. 137(11)), in marked contrast to letters patent of incorporation which expressly create a body corporate and politic; (iv) the French version of s. 137(1), perhaps better than the English version, serves to express what has occurred, "Deux ou plus de deux compagnies, ... peuvent fusionner et continuer comme une seule et meme compagnie". The effect is that of blending and continuance as one and the self same company; (v) the ACT contains a number of express provisions whereby the life of corporate creations may be terminated - *videlicit* where a company carries on business not within the scope of its objects (s. 5(4)), or forfeits its charter (s. 31), or surrenders its charter (s. 32), or is dissolved (s. 133(11)). The ACT is silent on the extinction of companies by amalgamation; (vi) if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code of* Canada or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary.
>
> ...
>
> The word "amalgamation" is not a legal term and is not susceptible of exact definition: *Re South African Supply & Cold Storage Co.*, [1904] 2 Ch. 268. The word is derived from mercantile usage and denotes, one might say, a legal means of achieving an economic end. The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the *Canada Corporations Act* and under the Acts of the various Provinces whereby two or more companies incorporated under the governing Act may amalgamate

> and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing business; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories, corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise.

27. That is, there is an identity of existence between the pre- and post-amalgamation corporations. Thus, Cadillac Fairview is as much Cadillac Developments Corporation Limited as the pre-amalgamation corporation was. Further, if the Board would not exercise its discretion to find that Cadillac Development Corporation Limited and Cadco are one employer, it is impossible to see how that analysis is changed by the addition to the business of Cadillac Developments of a similar business of another non-union employer, i.e. Fairview. Fairview carried on the same business as Cadillac Developments, not the same business as Cadco. After the amalgamation, Cadillac Fairview continued to do what Cadillac Developments and Fairview had done before the amalgamation, that is, assemble and develop land. Cadco continued to do what it had done, operate a general contractor's business whose only client, or whose primary client, was the corporation that owned and controlled it. The amalgamation itself did not create any erosion or potential for erosion of bargaining rights to any greater extent than the existence of Cadillac Development did on the day the Working Agreements were signed.

28. For that reason, I will not exercise the Board's discretion to grant relief in the Union's favour.

Sale of a Business

29. This can be dealt with very quickly. Cadco was shut down in 1981 or 1982 when its principals and its sole customer concluded that it was no longer profitable to operate or to continue in the business. The business was not transferred in any way to Cadillac Fairview. No physical assets were transferred (except for perhaps some used office furniture). No employees were transferred. Any construction employees were laid off, one manager retired and the other moved to other duties in a different jurisdiction. The two project managers were transferred to do different work, for which they were ultimately unsuited.

30. Most importantly, Cadillac Fairview did not acquire or take up the business of Cadco. It continued to do what it had always done: engage a general contractor to build its projects. It did not do what Cadco did, that is, to act as a general contractor, letting portions of the main contract to specialized sub-trades. Cadco's business was wound up. It disappeared. There was nothing left to transfer to anyone and nothing was transferred to Cadillac Fairview. There was no sale or transfer of a business of any sort.

Further Issues: The Union's Evidence of "Admissions"

31. The Union called a number of witnesses, although most of this evidence was in response to Cadillac Fairview's allegation of delay or abandonment. The evidence was in support of the proposition that the Union had not delayed in bringing the application, or that it had not abandoned its bargaining rights. As indicated, I do not need to deal with that issue.

32. Two witnesses, however, were proffered as evidence of an admission on a previous occasion by an officer of Cadillac Fairview that it was bound to the Working Agreement and hence to the Painters' Provincial Collective Agreements. In the first case, Tom Oldham was called to give that evidence with respect to Mr. Hendley. There is no evidence of any such statement, for reasons set out in a decision dated April 14, 2008.

33. The second witness was Mr. Joe O'Shea, a business representative based in Kingston, who did offer that evidence. He stated that he had filed a grievance with respect to work performed in a single store in the Cataraqui Mall in Kingston. As a result of that dispute, he had a discussion with Susan St. Clair, Mall Manager at the time. Mr. O'Shea described the project as an independent "Mom and Pop" sort of store, where the store owners were doing their own work in setting up the premises. His assessment of the resolution of the grievance was that the Union would "let this go and we would work together in the future". He also testified that Susan St. Clair acknowledged in this conversation that Cadillac Fairview was bound to the Painters' Collective Agreement. Ms. St. Clair testified that she did not do so. She said that she was new to her position and lacked the necessary knowledge to express such an opinion. Her evidence before me was given in the manner of a person who is both very cautious and very careful about the words she uses. Although I have no reason to doubt the sincerity of Mr. O'Shea's evidence, it does seem to me that he may very easily have heard what he wanted to hear. Similarly, Ms. St. Clair may well have been looking to avoid anything that constituted a disagreement or argument by using carefully ambiguous statements.

34. In the end, I do not need to decide exactly what was said. Even if she had said what Mr. O'Shea testified she said, or indeed if David Hendley had made the statements that the Union wanted to attribute to him, such evidence would be of no weight. It is easy to define an admission of fact, for example, a contractor who identifies his signature on a collective agreement. The further one gets from a fact and the closer to an opinion about a legal conclusion, the less value the statement has for the "truth of the contents". In this case, Cadillac Fairview had never signed a collective agreement. Since a related employer declaration may only be made effective by the Board, the most that could be said is that Ms. St. Clair was expressing an opinion as to what the Board might conclude if such a case were brought in the future. That is hardly an admission of fact. It seems unlikely that she was expressing an opinion about the application of section 69 of the Act to a transaction of which she had absolutely no knowledge. That is the most that one could attribute to such a statement, and such an opinion is neither determinative nor binding on the Board. There is no suggestion that this was a representation intended to effect pre-existing legal rights between the parties or one on which the Union relied to its detriment. The evidence is simply not determinative of anything. In any event, even if she was expressing such a belief or opinion, that is not an admission of any fact, and is not something to which I give any weight in this matter.

35. The Union also sought to rely on certain comments in a decision of the Board in a non-construction employer termination application brought by Cadillac Fairview in respect of the Carpenters Union. I dealt with this issue extensively in the April 30, 2008 decision. Essentially, I

concluded that *res judicata* did not apply and that the decision was not a decision *in rem*. I concluded by saying that the Painters could rely on it for what they believed it was worth, with weight to be determined at the end of the day.

36. David Hendley took the stand and stated that he did not recall and did not believe that he made the statement attributed to him at paragraph 4 of the earlier decision of the Board. I note that the issue in that case was not the existence of bargaining rights between the Carpenters Union and Cadillac Fairview, but whether or not they should be terminated. That is, the Board was simply sketching its understanding of the background facts that were relevant to the case, rather than coming to conclusions from an examination of evidence crucial to the decision it had to make. It is not a conclusion that the Board was required to come to as a basis for making the decision that it did at that time. If the Board, in the earlier case heard that evidence, I heard different evidence and I come to a different conclusion.

Conclusion

37. I conclude, therefore, that I decline to exercise the Board's discretion under subsection 1(4) or to grant the Union any of the relief it seeks. I further find that there has been no sale of business from Cadco to Cadillac Fairview. For this reason, these three applications are dismissed.

0591-08-R International Brotherhood of Electrical Workers, Applicant v. **Casino Rama Services Inc.**, Responding Party

Bargaining Unit – Certification – Charter of Rights and Freedoms – Certification – The IBEW applied to certify employees in the Facilities Project Management Department, one of eleven departments, of Casino Rama – The Employer objected to the bargaining unit because the Union was not registered under section 4(1.2) of the *Gaming Control Act, 1992*, and because the bargaining unit applied for was inappropriate – A majority of the Board held it did not need to determine the first issue in light of its finding on the appropriateness of the bargaining unit – The Board ruled that its general practice is not to certify departmental bargaining units because fragmentation could cause serious labour relations harm – The proposed bargaining unit employees shared a substantial community of interest with the Employer's other employees in terms of Human Resource Services, orientation, pay, benefits, compensation and benefit adjustments, overtime pay, vacation pay, holiday entitlements, shift and scheduling policies, breaks, meals, attendance management, performance reviews, and training and development – The department's employees also intermingled with other employees – The majority held that the Union failed to discharge its onus of establishing that the departmental unit was appropriate – Application dismissed

BEFORE: *Ian Anderson*, Vice-Chair, and Board Members *P. LeMay* and *S. McManus*.

APPEARANCES: *Ron Lebi, William Martindale, James Sims* and *Terry Dorgan* appeared on behalf of the applicant; *Stephen J. Shamie, Ilkim Hincer* and *Debra Pratt* appeared on behalf of the responding party.

DECISION OF VICE-CHAIR IAN ANDERSON AND BOARD MEMBER P. LEMAY:
January 13, 2009

1. This is an application for certification under the *Labour Relations Act, 1995*, filed by the International Brotherhood of Electrical Workers ("IBEW") with respect to certain employees of Casino Rama Services Inc. ("Casino Rama").

2. The application was filed on May 21, 2008. Pursuant to a decision of the Board (differently constituted) dated May 26, 2008 a representation vote was conducted on May 28, 2008. More than fifty percent of the ballots cast were cast in favour of the applicant.

3. Casino Rama objected to the application on two grounds: that the Board ought to dismiss the application on the basis that the IBEW, its officers, agents and officials are not registered under the *Gaming Control Act, 1992*; and the bargaining unit applied for is not appropriate. It maintains those objections.

The Facts

4. The parties argued these issues before the Board based on the following "Agreed Statement of Facts".

AGREED STATEMENT OF FACTS

The Application for Certification

1. An Application for Certification was filed by the International Brotherhood of Electrical Workers ("IBEW"), seeking to represent "all employees of the Facilities Project Management Department employed by Casino Rama Services Inc. in the Town of Rama, Ontario, save and except the Department Director and persons above the rank of Director."

2. The Application for Certification implicitly excludes all other Casino Rama employees.

3. Casino Rama objected to the Application for Certification on the following two grounds: (i) the IBEW does not have the right to represent employees at Casino Rama without registration under the *Gaming Control Act, 1992, S.O.* 1992, c.24 ("GCA"); and (ii) the scope of the bargaining unit proposed by the IBEW cannot be an appropriate bargaining unit.

4. The parties have agreed that both issues should proceed to a hearing.

(i) The IBEW's Gaming Registration Application with the AGCO

5. The employees of the Responding Party who are the subject of the Application for Certification are persons employed in gaming premises within the meaning of the GCA because they work inside the premises of Casino Rama, which are gaming premises and operator-regulated by the Alcohol and Gaming Commission of Ontario ("AGCO").

6. The Ontario Lottery and Gaming Corporation (OLG) is a provincial agency operating and managing province-wide lotteries, casinos and slots facilities at horse racing tracks. It is a corporation created in 2000 under the *Ontario Lottery and Gaming Corporation Act, 1999*. OLG operates five (5) charity casinos at: Brantford, Point Edward, Sault Ste. Marie, Thousand Islands, and Thunder Bay. The Great Blue Heron Casino is an aboriginal casino owned by the Mississaugas of Scugog Island First Nation. In addition there are four commercial resort casinos: Casino Rama, Caesars Windsor, Fallsview Casino Resort and Casino Niagara.

7. The Applicant, International Brotherhood of Electrical Workers ("IBEW") is not registered under the GCA or under Ontario Regulation 385/99 and neither are any of its officers, officials and agents.

8. Section 4 of the GCA states:

> 4(1) Except as provided in this Act and the regulations, no person shall provide goods or services with respect to the playing of a lottery scheme for which a licence is required or hold himself, herself or itself out as providing those goods or services, unless,
>
> (a) the person is registered as a supplier; and
>
> (b) the person is providing those goods or services to a licensee or a registered supplier.
>
> (1.1) Except as provided in this Act and the regulations, no person shall provide goods or services for a game of chance conducted and managed by the Ontario Lottery and Gaming Corporation or for any other business operated by, or on behalf of, or under contract with the Ontario Lottery and Gaming Corporation operated in conjunction with such a game of chance unless,
>
> (a) the person is registered as a supplier; and
>
> (b) the person is providing those goods or services to the Ontario Lottery and Gaming Corporation or a registered supplier.
>
> (1 .2) In addition to any provision of the Labour Relations Act, 1995, no trade union within the meaning of that Act shall represent persons employed in gaming premises unless the trade union and such of its officers, officials and agents as are prescribed by the regulations are registered as suppliers.

9. In determining registration requirements for trade unions under section 4 of the GCA, it has been the practice of the Alcohol and Gaming Commission of Ontario to require the registration of all directors and officers of the trade union as well as the business agents who would represent the employees in the bargaining unit.

(ii) Appropriateness of the Bargaining Unit

10. Casino Rama is a Gaming and Hotel operation, which includes an entertainment complex with a total of approximately 3455 employees.

11. Casino Rama operates a 192,000 square foot facility which includes: 2,300 slot machines; 120 gaming tables; a 5,000 seat Entertainment Centre; 9 restaurants; and an all-suite luxury hotel (all numbers are approximate).

12. The facility is divided into the following eleven *(11)* Divisions:

- Executive (approximately 10 employees)
- Finance (approximately 363 employees)
- Food and Beverage (approximately 777 employees)
- Hotel Operations (approximately 244 employees)
- Human Resources (approximately 27 employees)
- Internal Audit (approximately 3 employees)
- Legal/Administration (approximately 232 employees)
- Marketing (approximately 295 employees)
- Operations (approximately 1276 employees)
- Resort Operations (approximately 186 employees)
- Surveillance (approximately 36 employees)

13. The Facilities Project Management Department (and those employees subject to the Certification Application) is within the Resort Operations Division.

14. The employees in Facilities Project Management positions comprise 21% of the Division and only 1% of Casino Rama's employee population.

15. The other employees in the Resort Operations Division are employees in Environmental Services (77% of the Division) or Resort Operations (2% of the Division).

16. The Resort Operations Division is one (1) of eleven (11) Divisions in the Casino.

17. The Facilities Project Management department is one (1) of two (2) departments in the Division. The Division in its entirety is only 5% of Casino Rama's employee population.

The Operation

18. Casino Rama is a Gaming Facility which operates under the GCA. The Hotel was added as an ancillary to Casino Rama's primary function which is Gaming. The Hotel is not a separate and distinct entity but rather, a fully integrated component of the business.

19. The Facilities Project Management employees are employees who are employed in the Resort Operations Division, in the following classifications: General Maintenance; Gas Technician; Painter; Painter decorator lead hand; Electrician; Finishing Carpenter; Facilities Lead Hand; Plumber; Shift Engineer; Project Administrator/CAD Operator; Project Lead Hand; and Magma Coordinator.

20. Employees in these classifications provide services for the entire Casino and Hotel. This includes providing services on the Gaming Floor; Entertainment Centre; back of the house; Administrative Building; Hotel, etc. This is not a group of stand-alone employees. Rather these employees are an essential element of the entire Casino Rama undertaking. The department is responsible for the upkeep and repair of the physical plant, as well as any additions and renovations to the resort. The department maintains a 24/7 on-site presence via three daily rotating shifts. Contract vendors provide special skills and services. Six (6) full time Shift Engineers report to the Managers. There are three (3) Leads [sic] Hands and approximately eight (8) ticketed tradespersons who report to the Supervisors. Management in this department is comprised of the following: Director; Manager of Facilities; Assistant Manager of Facilities/Chief Building Operator; and Project Co-ordinator.

21. The balance of the employees in the Division are employees employed in Environmental Services. These employees are responsible for maintaining the Casino and Hotel by providing a clean, comfortable and safe environment for patrons and employees. Environmental Services employees, however, do not clean the Hotel. The Hotel has its own house cleaning staff.

Terms and Conditions of Employment

22. Employees at Casino Rama are referred to as C.R.E.W. (Casino Rama Employee Workgroup) Members.

23. All employees who are issued uniforms are subject to the same uniform regulations. Different departments have different uniforms. For example, Environmental Services employees and Facilities employees wear different uniforms.

24. Some employees carry Magma devices. Currently only Facilities employees and Housekeeping staff carry the devices. "Magma" is an original 'alpha' software developed jointly by Casino Rama and IJW of Orillia, Ontario. Magma offers an automated work order system via individual handheld units through which front line staff receive work orders (instructions) to be actioned. These items range from squeaking door hinges to be oiled, to entire HVAC systems needing repair. The intention is for the system to be

accessed via computer by employees and department heads, company-wide. Alternatively, staff can call "At Your Service" and explain the requirement to an operator who will input the information into the system. The goal of the software is to include other departments and user groups so that work orders and regularly scheduled duties can be issued and tracked in electronic fashion. The Magma project was launched in the Facilities Management Department but is expected to be rolled out to other departments who could benefit from the program. The roll-out has been discussed at Magma meetings.

25. Supervisors and those above the level of supervisor are responsible for staff planning requirements.

26. All employees must apply for approval of leaves of absence.

27. All employees use the same entrances and exits; and swipe their attendance cards at the same swipe-in machines. Some employees, such as Environmental Services Department employees, usually enter the workplace on the Casino side and other employees, such as Facilities employees, usually enter the workplace through the Hotel. The Environmental services office is in the Casino and the Facilities office is in the Hotel.

28. Employees in most departments begin their day with a brief departmental meeting held in the department office.

29. There is a common orientation for all new employees. This includes Facilities Project Management employees, employees in the Resort Operations Division and employees throughout the Casino. No employee is treated any differently with respect to orientation.

30. All new employees are required to attend mandatory training. Depending on the position into which an employee is hired, he/she may receive specific training: Fall Protection; Aerial Lift Training; Propane Handling; WHMIS; Confined Space Awareness.; Smart Serve; Anti-money laundering training; etc. The Facilities Department has its own General Safe Work Procedures Manual (Exhibit to be filed at the hearing). Other departments in the Casino have their own Manuals specific to their departments.

31. All employees are asked to complete the same company-wide surveys.

32. All employees participate in social events and parties together (including but not limited to the Holiday Party, Appreciation Events, Town Halls, etc.). The workplace is governed by a team approach (ie. Peer Review).

33. Facilities Project Management employees and the rest of the Casino and Hotel employees share common Human Resources Services.

34. There is a single Joint Health & Safety Committee although each department has its own worker representative. For example, Environmental Services has a worker member on the Health and Safety Committee and the Facilities department also has a worker member on the Committee.

35. No distinction is made between Facilities Project Management employees and others at the Casino or Hotel or Entertainment Centre with respect to the provision of pay and benefits, except that not all employees are paid on the same day. Some departments pay their employees one week (all Operations employees) and the other departments (non-Operations employees) pay their employees on the following week.

36. Some employees, are employed in positions that provide the possibility of receiving gratuities. Environmental Services employees are employed in positions whereby they may accept gratuities. Facilities Project Management employees are not employed in positions whereby they may accept gratuities.

37. An employee moving from one department to another department serves a probationary period in the new role. Depending on the transfer from one position to the next, the employee may be paid the starting wage of the new position, without regard to prior seniority. However, in many cases, the transferred employee is paid a wage rate in the new position so as not to create a decrease in pay. For example, an employee who was recently transferred from Houseperson at $16.67 to Rooms Maintenance Attendant, did not get paid the starting wage rate of the new position ($15.65). Instead, she was paid the third rate on the matrix ($17.36).

38. The employees, who are eligible, all receive compensation and benefit adjustments at the same time.

39. All employees are provided with Personal Time Off ("PTO") in accordance with the same policy and practices.

40. Facilities Project Management employees work similar shift schedules as the rest of the Casino and Hotel and Entertainment Centre. Some employees (including Facilities employees) work 7.5 hours/day (37.5 hours/week). Other employees work 8 hours/day (40 hours/week). The policies and practices regarding scheduling, shift exchanges and changes are the same for all employees.

41. All employees follow the same practices regarding breaks and meals, with certain exceptions. Dealers work 1.5 hours and then take a 30 minute break. Many employees in Food and Beverage typically take a meal break before the start of the shift.

42. The policies with respect to overtime pay, vacation pay, and holiday entitlements are the same for all employees. The Employer pays an overtime premium after 40 hours worked so the first 2 ½ hours of overtime worked by employees who work a 37.5 hour work week does not attracted a premium. With respect to holiday scheduling, all departments use a seniority system. Holiday scheduling for Facilities Management employees is done on a first-come, first-serve basis.

43. Scheduling and "Early Outs" are treated similarly for every Department.

44. Employees are invited and encouraged to apply for jobs in other departments. Casino Rama follows a Promotion/Transfer Policy. Open

vacancies are posted on a Job Opportunity Board for employees from any Department to apply. Casino Rama also uses a Job Hotline which applies to all employees. Occasionally, jobs are awarded without a prior posting.

45. Every Department follows the same "Open Door Policy". Communications are done through "Information Row", the Smoke Signals publication and Department meetings. Approximately eleven (11) departments, including the Facilities department have a monthly newsletter (Exhibit to be filed at the hearing). The President has mandated that all departments host at least one department meeting once each year at which attendance is mandatory. Some departments, including Facilities Management, host two or more meetings each year. There are no Division meetings but all employees are invited to annual Town Hall meetings hosted by the President of Casino Rama.

46. Casino Rama also convenes "roundtable meetings" in every department throughout the year. At these meeting, a representative of the department meets with management staff to discuss and review issues and concerns of the department. A representative from human resources is in attendance at these meetings.

47. Training and Development opportunities are extended to all employees at the Casino's on-site training facility.

48. All employees are invited into the employee Gaming Floor lounges for complimentary coffee, juices and soft drinks. Other lounges are also provided away from the Gaming Floor.

49. Annual performance reviews are conducted for all employees. To date, company-wide, there are 480 hourly and salary performance reviews outstanding. In addition, Shift Engineers complete an evaluation form for Facilities employees on a monthly basis and provide this form to the Facilities Manager. Other departments use a variety of similar feedback mechanisms as well.

50. An Attendance Management Program is in place which applies to all employees, regardless of department or classification. Changes made to the Program affect all employees in the same way.

51. Casino Rama offers Reward and Recognition Programs for all employees, regardless of department or classification.

Intermingling

52. There are approximately 38 employees who have transferred in or out of positions in Facilities Project Management positions to positions elsewhere in the Casino or Hotel. Some examples include, but are not limited to:

- General Maintenance Mechanic applied for and was successful in the posting for the position of Senior Buyer;
- General Maintenance Mechanic went to Security;

- Finishing Carpenter went from Slot Change Attendant to Games Maintenance Attendant;
- Kitchen Utility Attendant went to Painter;
- Limo Driver went to Plumber;
- Grounds Maintenance Attendant went to Valet Parking;
- Ticket Usher went to General Maintenance and then back to Ticket Usher;
- Shift Engineer went from Dealer and then to Operator Building Systems;
- Magma Coordinator went from Front Desk Agent and then to Facilities co-ordinator;
- General Labourer went to Kitchen Utility Attendant;
- Wardrobe Attendant went from Painter and then to Coat Room Attendant;
- Buyer went from Slot Change Attendant to General Maintenance Co-ordinator;
- Ground Maintenance Attendant went to Players Passport Co-ordinator;
- General Maintenance Attendant went to Impress Attendant

Collective bargaining

53. "All employee" units have been certified at the following Casinos:

Casino Windsor (CAW);
OLG Casino Brantford (CAW);
Great Blue Heron Charity Casino (CAW)

54. "All employee" units have been certified at the following Slots operations:

OLG Sudbury Slots (CAW); and
OLG Kawartha Slots (SEIU, Local 2).

55. In addition, there have been a number of Applications for Certification by various unions seeking an "all employee" unit, including but not limited to:

Casino Niagara Application #1 (CAW);
Casino Niagara Application #2 (CAW)
Casino Niagara Application #3 (CAW)
OLG Western Fair Slots (OPSEU);
OLG Woodbine (OPSEU);

> OLG Casino Sault Ste. Marie (CAW); and
> OLG Casino Pointe Edward (Teamsters).

> 56. Since Casino Rama opened its doors in 1996, there have been a number of unsuccessful union attempts to organize the employees for purposes of collective bargaining. An application for certification made by the Steelworkers was dismissed in 2000 and an application by the Teamsters was dismissed in 2004 when a majority of employees in each application voted against representation by these unions. In addition, the following unions initiated organizing campaigns and later abandoned them when they found themselves unable to achieve sufficient employee support:
>
> IBEW (1997)
> OPSEU (2002)
> CAW (several attempts, most recently in 2005)

The Issues

5. While the issue of whether IBEW has the right to represent employees at Casino Rama without registration under the GCA was argued as a preliminary matter by Casino Rama, we find it convenient to first address the issue of whether or not the bargaining unit proposed by IBEW is an appropriate bargaining unit.

An appropriate bargaining unit

6. The IBEW has applied for a bargaining unit restricted to employees of a single department of Casino Rama, the Facilities Project Management Department ("Facilities Department"). The IBEW takes the position that this departmental unit is an appropriate unit in the circumstances of this case. Casino Rama takes the position that the departmental bargaining unit is not appropriate and that an all employee unit would be appropriate, or in the alternative that a unit of employees in the Resort Operations Division, of which the Facilities Department is part, would be appropriate. Both counsel provided helpful summaries of the arguments which they were to advance. We think it is useful to set out those summaries, dealing with details of the arguments as necessary in the analysis section of this decision.

7. The IBEW's arguments were addressed to 11 points:

> i. The Facilities Department represents a coherent, rational and distinct group of employees who share a community of interest and who can bargain together on a viable basis.
>
> ii The Resort Operations Division is not a particularly rational grouping, except for Casino Rama's purposes. Apart from the administrative connection at the top, there really is no connection between the Facilities Department and Environmental Services Department.
>
> iii. Employees of the Facilities Department have unequivocally expressed their appetite for collective bargaining.
>
> iv. Employees outside the Facilities Department have also demonstrated their lack of appetite for collective bargaining.

v. Promotion of collective bargaining and the practices and procedures of collective bargaining is this Board's raison d'etre.

vi. The Act is designed to facilitate collective bargaining.

vii. At least in 2008, accessing collective bargaining is not merely an economic right it is a fundamental freedom that is constitutionally protected.

viii. On the question of appropriate bargaining units, the Board has an absolute discretion. Its approach has been sometimes to be guided by "policies" and on other occasions to balance competing considerations concerned with access to collective bargaining on the one hand and the likelihood for serious labour relations problems for an employer on the other.

ix. Having regard to the Supreme Court of Canada's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII) (June 8, 2007) (hereafter "*BC Health Services*") the Board should place a greater emphasis on access to collective bargaining than it perhaps has in the past.

x. The Board should allow this application because the bargaining unit is appropriate, the unit presents a viable vehicle for collective bargaining, its boundaries are precise and it is not drawn in a way that will interfere with the employer's operation. There is no concrete demonstrable evidence of serious labour relations problems should the union's bargaining unit description be accepted: *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617.

xi. On the agreed facts, and in these circumstances, these employees should not be deprived of their right to engage in collective bargaining.

In addition the IBEW cited *Woodward Stores (Vancouver) Ltd.*, [1975] 1 Canadian LRBR 114 (B.C.).

8. Casino Rama's arguments were addressed to 6 points:

i. The test that has developed from *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 (hereafter "*Sick Kids*").

ii. The Board's practice with respect to maintenance employees, with respect to which it cited *Baycoat*, [2002] OLRD No. 731 (Feb. 26, 2002) and *Horizon Poultry Products Inc.*, [1998] OLRB Rep. March/April 208.

iii. The Board's view on fragmentation, with respect to which it cited *Horizon Poultry Products Inc.*

iv. The community of interest test from *Sick Kids* and the integration of the Facilities Department into the operation, with respect to which it cited *Baycoat*, *Horizon Poultry Products Inc.*, *Hudsons Bay Co.*, [2000] OLRD NO. 730 (April 4, 2000), *Lionhead Golf & Country Club, Division of Kaneff Properties Litd.*, [1996] OLRB Rep. March/April 271 and *Miller Transit Ltd.*, [2005] OLRD No. 1236 (Mar. 14, 2005).

v. Labour relations harm, the second part of the test from *Sick Kids*, with respect to which it cited *Baycoat*, *Hudsons Bay Co. Lionhead* and *Sheehan's Truck Centre Inc.*, [1999] O.L.R.D. No. 2852.

vi. The norm in the casino industry with respect to bargaining unit descriptions.

Analysis

9. The IBEW argues the fact that the Supreme Court of Canada has now recognized collective bargaining is protected by the *Charter* is important, because protecting access to collective bargaining is the fundamental responsibility of the Board. It argues that the Board should, therefore, reconsider the issue of what constitutes an appropriate bargaining unit. The Board, it argues, should not be asking itself in a case such as this, what is the Board's policy with respect to certifying departmental bargaining units. Rather, it says, the Board should be asking itself how it can facilitate employees' access to their constitutionally protected freedom of collective bargaining. To the extent that access to collective bargaining may be determined by the exercise of the Board's discretion with respect to the definition of an appropriate bargaining unit, the IBEW argues that the Board should pay particular attention to that part of the definition that is concerned with access.

10. In addressing this argument, it is important to begin by noting that the facts in *BC Health Services* bear no resemblance to the facts in the present application. At issue was legislation which invalidated significant provisions of existing collective agreements and effectively prevented meaningful collective bargaining with respect to a number of issues. The affected unions, and a number of individuals, attacked the legislation as unconstitutional. The court agreed, holding that the guarantee of freedom of association afforded by section 2(d) of the Charter included protection for the process of collective bargaining.

11. By contrast the issue in this case is the definition of a bargaining unit of hitherto unorganized employees which would be appropriate for collective bargaining. The Act does not take the right of collective bargaining away from these employees rather it gives effect to that right. Further, the IBEW does not argue that refusal to grant a certificate for the bargaining unit it has applied for would be a breach of section 2(d) of the Charter.

12. Second, to the extent that the interpretation and administration of statutes should reflect Charter values, it is important to note that the value in question, protection of the right of collective bargaining, is already reflected in the *express* purposes of the Act. Section 2 of the Act provides in part:

> The following are the purposes of the Act:
>
> (1) To facilitate collective bargaining between employers and trade unions that are the freely designated representatives of the employees.

Further, this purpose, variously stated, has been part of the Act since its inception. Thus, *BC Health Services* does not result in the introduction of an interpretative principle that has hitherto been missing from the Act.

13. Third, the Board's approach to determining the appropriate bargaining unit is already informed by the need to ensure that the expression of the right to collective bargaining is not

impeded. Indeed this is apparent from some of the decisions excerpted in *Sick Kids*. Paragraph 21 of *Sick Kids* contains a lengthy excerpt from *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, which includes the following statement:

> 19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the Labour Relations Act. ….

This is followed by an excerpt from *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7, which includes the following statement:

> 10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees." More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

14. We are not satisfied, therefore, that *BC Health Services* provides a point of departure from the Board's long established jurisprudence in this area.

15. Further, as acknowledged by the IBEW, the right to collective bargaining means the right to viable collective bargaining. This theme is developed in another paragraph of *Ponderosa Steak House*, which is also excerpted in paragraph 21 of *Sick Kids*:

> 11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining." In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

16. This theme is further developed in *Sick Kids*, in its discussion of the Board's role in determining the "appropriate bargaining unit" (at paragraph 17):

> Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke

> costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit - particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. it is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or inter- change with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.
>
> (Emphasis added.)

17. The well known test ultimately articulated by *Sick Kids* is as follows (at paragraph 23):

> [D]oes the unit which the union seeks to represent encompass a group of employees with sufficient community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

18. Both parties concur that the employees in the Facilities Department represent a coherent group which share a community of interest. We are satisfied on the evidence that they also share a substantial community of interest, in the sense of objectives to be achieved through collective bargaining, with all the other employees of Casino Rama. In this respect, we note that the evidence establishes that all employees share common Human Resource Services, receive the same orientation, and are treated the same with respect to the receipt of pay and benefits, adjustment of compensation and benefits, overtime pay, vacation pay, holiday entitlements, Personal Time Off, policies regarding scheduling and shift exchanges, timing of breaks and meals, attendance management and performance reviews. Further the evidence establishes that training and development opportunities are extended to all employees and that there has been a significant degree of intermingling of employees in the Facilities Department with other employees through transfers in and out of that Department.

19. The disagreement of the parties is principally with respect to whether certification of that group of employees as a stand alone unit would result in serious labour relations problems for the employer.

20. Casino Rama states that it would result in fragmentation of the workplace into multiple bargaining units, and thus result in serious labour relations problems. It relies on what it describes as the Board's specific practice of finding bargaining units restricted to maintenance departments as inappropriate and more generally the Board's concern to not unduly fragment bargaining units. It states that the only appropriate bargaining unit is an all employee unit, or in the alternative a bargaining unit comprised of the entire Resort Operations Division.

21. The IBEW acknowledges that its proposed bargaining unit of approximately 38 employees represents a very small group of Casino Rama's employees, approximately 1% of the overall employment complement, but argues that in absolute terms a bargaining unit of 38 employees is not insignificant, rather it is comparable to the average number of employees in bargaining units certified by the Board. Further, it argues that while the Facilities Department is relatively small in terms of the overall size of the operation, on the agreed facts it is essential. Accordingly, it argues that its proposed unit is viable for the purposes of collective bargaining, unless doing so would cause serious labour relations harm to the employer.

22. The IBEW urges the Board to reconsider its "policy" or practices with respect to certifying departmental bargaining units, suggesting a certain ossification of the Board's approach to the determination of the appropriate bargaining unit, reminiscent of the "fairly rigid (almost "class") divisions between employee groups" described and swept aside by *Sick Kids*.

23. In this respect, it is interesting to note that while the Board in *Sick Kids* cast doubt on the "conventional wisdom" with respect to distinctions for bargaining unit purposes of "white collar" v. "blue collar", "skilled" v. "unskilled or semi-skilled", "part-time" v. "full time", "employees working for an employer in one plant or municipality" v. "employees in another plant or municipality" (see paragraph 14 of the decision), nonetheless it continued to be concerned about creating an "unduly fragmented bargaining structure [which] could contribute to subsequent labour-management problems, tensions within and between bargaining units, and an escalation of industrial conflict" (see paragraph 20 of the decision). Departmental units clearly have the potential of giving rise to such undue fragmentation, which in turn is a source of serious labour relations harm.

24. The IBEW argues, however, that in fulfilling its role to facilitate collective bargaining the Board should not reject a smaller unit on the basis that a larger unit may be more rational in the future. It cites *Woodward Stores* in support of this proposition.

25. *Woodward Stores* was a 1974 decision of the B.C. Labour Relations Board, written by its then Chair, P.C. Weiler. It was concerned with an application for certification for a departmental unit of an employer in a sector, referred to by the Board as the "department store industry", which was all but non-unionized: see page 118. It was the difficulty of organizing the sector, not the specific employer, which led the B.C. Board to certify the departmental unit. By contrast, the casino sector which is at issue in this case has a relatively high level of unionization. On the agreed facts, three (3) of the ten (10) casinos in the sector, at least one which is larger than Casino Rama, have been organized on an all employee bargaining unit basis, as have two (2) Slots operations.

26. Further, the B.C. Board in *Woodward Stores* was clearly influenced by its view that it had the ability to subsequently enlarge or combine existing bargaining units, a view which the IBEW has candidly conceded is not shared by this Board. The B.C. Board stated (at p. 120):

> However, the Board is determined not to permit that kind of practice to build in, indefinitely, a large number of small collective bargaining relationships with one employer. We will be flexible in defining appropriate bargaining units in areas such as the department store industry to afford collective bargaining some room to put down firm roots. However, after a time, rather than creating new bargaining units, we will consider that the existing units must be enlarged or merged and all of those employees represented by one "trade-union".

27. As Casino Rama points out, any doubt as to Professor Weiler's views is settled by reference to his seminal work, *Reconcilable Differences: New Directions In Canadian Labour Law*, published some five years after his decision in *Woodward Stores*, in which he clearly articulates the difficulties which arise from fragmented bargaining units, and states that the policy of the B.C. Board, under his stewardship, was to "avoid fragmentation in new bargaining relationships" (at page 159).

28. The IBEW argues that in any event this Board has recognized that in the absence of concrete demonstrable problems, on an application for certification the applicant's proposed bargaining unit will be acceptable to the Board. It cites *Active Mold Plastic Products Ltd.* in support of this proposition. It argues that the employer's concerns about the future impact of fragmented bargaining units are entirely speculative and do not meet this test.

29. The argument that a departmental bargaining unit is appropriate because it would allow employees in a department to pursue their associational rights is not new to this Board. It was articulated, for example, by the applicant union in *Baycoat* (see paragraph 31 of that decision), and was the foundation of the applicant union's argument in *Horizon Poultry*. *Horizon Poultry* is particularly apt because in that case, similar to the argument advanced by the IBEW in this case, the applicant union argued that employees in the departmental unit had a substantial community of interest and that the suggestion that certification of a departmental unit would result in serious labour relations harm should be rejected as speculative and relied upon *Active Mold Plastic Products Ltd.* The Board rejected that argument, for reasons that are equally applicable to the case at hand:

> 7. … there can be no doubt that there is a substantial "community of interest" between most of the employees working in this department. Indeed, among the majority of those employees the level of distinctiveness or "community of interest" may be greater than it is among employees in other departments. However, and for two reasons, that does not determine the matter. The first reason is theoretical. The second is factual. First, the Board has said repeatedly in recent years that the concept of "community of interest" is of little utility in resolving these issues. The level of "community of interest" necessary to demonstrate viability in the context of the *Sick Kids* test is truly minimal. It is a threshold which most proposed bargaining unit structures can clear. The real focus of the test is on the concept of "serious labour relations problems". (On this question, more will be said below.) Secondly, and even working within that concept, as a factual matter it is clear that there are communities of interest in this case that extend beyond the group in question. ….
>
> 8. …. As noted in the case law referred to above, the Board's approach to determining bargaining unit appropriateness reveals a strong aversion to

"fragmentation" or the creation of individual "islands" of employee groupings, each with their own terms and conditions of employment and potential collective bargaining agents. While it may well be the case that the remaining eight departments in this workplace do not share the same *level* of "community of interest" as the "Maintenance and Power Services Department" employees, such distinctions can become extremely fine. For the most part, and except in exceptional circumstances, they are not ones that the Board is prepared to make. Rather, the Board's focus is on "fragmentation" or the problems associated with carving up a single workplace into separate collective bargaining pods on the basis of varying degrees of distinctiveness. Unless there are good reasons for doing so (e.g. related to access to collective bargaining) the Board will generally not certify such groupings. On this point, and in addressing the applicant's concern about speculation, the Board can do no better than reproduce the following excerpts from *Sifton Properties Limited*, above, at para 29:

> 29. In many cases, the Board has underlined its reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmentation in bargaining which that creates, as expressed in the following passage from *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. July 736:
>
>> 23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W.R. Grace & Co. Of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General And Orthopaedic Hospital*, [1981] OLRB Rep. Nov. 1672; *University Of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Roscoe Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton's Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In *Eaton's*, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen ... .
>>
>> 25. Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the Canada Labour Code to delete the provisions (similar to section 6(3)) protecting craft

> bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see *Feed-Wright Limited*, [1979] 1 Can. LRBR 296; *Atomic Energy of Canada Ltd.* (1978), 1 Can. LRBR 92; and *Cablevision Nationale Ltée* (1979), 3 Can. LRBR 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: *Reconcilable Differences: New Directions In Canadian Labour Law*, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

The Board has departed from that approach on the agreement of the parties and in particular situations of historical anomaly, or in light of the history of a particular sector, acceding to requests for classification-specific bargaining units in some cases. As well, where the applicant has been able to show difficulties with access to bargaining, particularly in situations where the respondent was in effect asking the union to organize more than one work site, the Board has balanced the interests of the parties, giving particular weight to the organizing interests of the employees and certified unusual bargaining units. However, it has never done so lightly, or without a particular reason to do so.

9. The Board's practice of not granting departmental or classification-based bargaining units is grounded in its industrial relations expertise and in its superintending function. The Board is entitled to draw on its experience in fulfilling this role and in establishing such practices. That is part of the reason why the Board is a Board and not a court. In this area, the Board's practice is well known. It is found in the case law set out above. Problems of fragmentation are not restricted to those identified by Mr. McCreary but are legion in the Board's case law. The reference to the requirement of "concrete demonstrable problems which will result from the applicant's proposed bargaining unit" noted in such cases as *Active Mold Plastic Products Ltd.* [1994] OLRB Rep. June 617, is meant to *shift the focus away from arguments concerning differing communities of interest*. It is not meant to suggest that the applicant gets the unit that it applies for no matter how that unit is defined and it is certainly not meant to suggest that fragmentation and departmental bargaining units are not problematic. While the Board must always be alive to the possibility of exceptions, for the reasons already given this case is not one of them.

10. Finally, I would observe that there is a significant value to be derived from certainty in this area. Parties understand the way in which organizing must be conducted and govern their affairs accordingly. Funds are not expended, employee expectations are not raised, and scarce public resources are not drawn down in pursuit of collective bargaining structures which are unlikely to pass muster. Despite

> counsel's best efforts to distinguish this case from the substantial body of law in this area, it falls within the general principle outlined above.
>
> [Emphasis added. The reference to Professor Weiler's *Reconcilable Differences: New Directions In Canadian Labour Law* is also to be noted.]

30. The Board's "practice" or "policy" of not granting departmental units, thus, is based on labour relations reality. In general, departmental units result in fragmented bargaining units. Fragmented bargaining units in turn cause serious labour relations harm. Some of the reasons for this are described in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug 1250 at paragraph 28, quoted and adopted in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481 at paragraph 50, which in turn is quoted and adopted by *Sick Kids* at paragraph 18. (Reference may also usefully be had to *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451 at pp. 1466 – 73 for an elaboration of the nature of that serious labour relations harm.) As stated in *Kidd Creek Mines* at paragraph 50:

> A patchwork quilt of bargaining units is a recipe for industrial unrest – if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

31. The Board's practice or policy of not granting departmental units is not without exception. As noted in the excerpt from *Horizon Poultry* set out above, the Board has at times been prepared to consider the agreement of the parties, historical anomalies or the practice of a sector. Whatever their current application, none of those exceptions are relevant to the case at hand.

32. Casino Rama argues that the Board's jurisprudence establishes that difficulty in organizing is not a reason to depart from the practice or policy of not granting departmental units, especially when there are no compelling reasons. It cites: *Horizon Poultry*, at the conclusion of paragraph 8, reproduced above; *Sheehan's Truck Centre* at paragraph 28; and *Northwestern/York-Finch Hospital*, [1997] OLRB Rep. Sept./Oct. 872 at paragraph 33 (reproduced in *Simcoe Block*, [2005] O.L.R.D. No. 2496 (June 7, 2005) at paragraph 38).

33. The IBEW argues that if the departmental unit is denied, the evidence establishes that the affected employees will not have access to collective bargaining. It points to the agreed fact that Casino Rama has been the subject of two prior unsuccessful certification applications in addition to five other unsuccessful organizing campaigns. Further, it distinguishes *Baycoat, Horizon Poultry, Hudson's Bay* and *Lionhead* on the basis that in none of those cases was there a comparable history of unsuccessful organizing drives. It argues that there is no danger of fragmentation of bargaining units in the case at hand because there is no prospect of an application for an "all employee" or other bargaining unit at Casino Rama. In the alternative, it argues that if an application for another departmental unit were to be made, then the Board should address the question of fragmentation of bargaining units within the context of that application.

34. We do not agree with the IBEW that this is a question which should only be addressed within the context of a subsequent application. We agree with Casino Rama that by then the pattern will be set and it will be "too late". If this department is appropriate, why not another? We note again that the Facilities Department represents 1% of Casino Rama's employee population. While there was no evidence with respect to how many departments exist at Casino Rama, the evidence establishes that there are eleven Divisions, the next highest level in its administrative structure. The

prospect of multiple departmental bargaining units is sufficient to give rise to concerns of serious labour relations harm.

35. The onus of establishing that its proposed bargaining unit is appropriate lies on the IBEW. In the absence of evidence to the contrary, the Board's experience leads it to conclude that granting a departmental unit will lead to undue fragmentation of bargaining units within this workplace unless there is no reasonable prospect that a union will succeed in organizing the other employees in the workplace. The fact that no union has been successful in organizing Casino Rama is at best circumstantial evidence that there is no reasonable prospect of another successful organizing drive. We are not satisfied, however, that this is the only conclusion which can be drawn from this evidence standing alone: it may be that a different union, a different campaign or a different context would yield a different result at this casino. The view that a future campaign might be successful is supported by the evidence with respect to the relatively high level of unionization in the casino sector referred to earlier. In the result, we are not satisfied that the IBEW has discharged the onus of establishing that its proposed departmental unit is appropriate.

36. We would hasten to add that while we have focused on the issue of undue fragmentation in considering whether the proposed departmental unit is appropriate, this is done in response to the IBEW's argument. We do not mean to suggest that fragmentation is the only relevant issue in determining an appropriate bargaining unit. Put differently, this decision should not be understood as a departure from the multi-factorial analysis articulated in *Sick Kids* at paragraph 17, and reproduced above.

37. Casino Rama argues not only that the departmental unit applied for is not appropriate, but that the only appropriate unit is an all employee unit. We do not, however, find it necessary to address this issue as we were advised that the parties have concurred that if the bargaining unit applied for is not appropriate, then the application should be dismissed pursuant to section 8.1 of the Act.

38. Accordingly, the application is dismissed pursuant to section 8.1 of the Act. In the result, there is also no need to address the preliminary issue argued by Casino Rama with respect to the effect of the fact that the IBEW is not currently registered under the GCA.

DECISION OF BOARD MEMBER SHANNON MCMANUS: January 13, 2009

39. While some previous decisions of the Board have ruled against departmental bargaining units, it is warranted in the particular circumstances of this application.

40. The bargaining unit proposed by the applicant, a maintenance unit of 38 employees, is viable for the purposes of collective bargaining and the employees do share a community of interest. They have voted to be represented by the IBEW.

41. The casino sector in Ontario has proven notoriously difficult to organize over the past 15 years since its inception, as the number of failed attempts at this and other large casinos attests. In the 12 years that Casino Rama has been open there have been at least five unsuccessful organizing drives. Only three corporate casinos have been organized, and these may be anomalies. The Windsor Casino, for example, is situated in a city with a highly unionized culture. The large turnover of part-

time staff in these 24-hour casinos and the intense security issues compound the difficulty of union organizing in this sector. For these reasons, the *Woodward* decision does apply here.

42. We must balance concerns about possible fragmentation with concerns about denying union representation to workers who share a community of interest and have a right to access to collective bargaining.

43. We have no way of predicting the nature of future bargaining units at Casino Rama. The union should not bear an onus to establish that there will be no further successful organizing drives. Rather, the onus should be on the employer to establish the labour relations harm that would result from this proposed certification. This is the key consideration.

44. This particular certification would create a workplace where most of the employees remain unorganized, and a small percentage of them would belong to a particular bargaining unit. Such workplaces do exist elsewhere.

45. There is no concrete evidence that granting this departmental unit would lead to undue fragmentation within this workplace. There may be no further successful organizing drives at the casino. Casino Rama could end up with two bargaining agents, one for this group and another for the rest of the workforce. It would be difficult to characterize such a workplace as "fragmented." It is also hard to conceive of such a situation being untenable for the employer, since it exists in many workplaces that engage in harmonious and viable collective bargaining.

46. In addition, the *Hospital for Sick Children* and other decisions cited regarding the Board's obligations to consider fragmentation, do not rule out multiple bargaining units. It depends, of course, on the circumstances.

47. In my view, additional labour relations concerns expressed by the employer do not pose a significant barrier to this certification. There are many workplaces where unionized workers transfer to non-union jobs and vice-versa, and workplaces where workers transfer from one bargaining unit to another, despite seniority and posting requirements. There is nothing to prevent unionized workers from sitting on joint health and safety and other workplace committees. These issues can be addressed at the bargaining table.

48. *Active Mold Plastic Products* is relevant to these particular circumstances:

> It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied "communities of interest" in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board's focus should be upon the concrete, demonstrable problems which will result from the applicant's proposed bargaining unit should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant's proposed bargaining unit will be acceptable to the Board.

49. What we do know at this time is that a group of workers have expressed a wish to have a union represent them and to engage in collective bargaining. Given the difficulty of organizing in this sector and the lack of significant labour relations concerns, we should certify this unit.

50. For the above reasons, I must dissent from the decision of the Board in this case.

3537-07-U Canadian Union of Public Employees and its Local 907, Applicant v. **City of Belleville**, Responding Party

Employee Status – Unfair Labour Practice – The union complained that the employer's unilateral transfer of its payroll staff out of the bargaining unit violated ss. 17, 70, 72, 73 and 76 of the Act – The employer's position was that the payroll staff were increasingly engaged in grievance administration, collective bargaining and policy development; in addition, the physical move of the Human Resources department to new premises required the entire staff to work together in an open area where privacy could no longer be guaranteed – The Board held that the union's efforts to grieve the employer's actions were not thwarted – Furthermore, the parties were able to bargain a new collective agreement satisfactory to both sides without a labour disruption – Commenting that the issue could have been handled differently by the parties, the Board nonetheless found no violations of the Act – Application dismissed

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Nancy Rosenberg, Greg Burkitt, Krista Cowan* and *Scott Whiteman* for the applicant; *Kees Kort* and *John Martin* for the responding party.

DECISION OF THE BOARD: January 21, 2009

1. This is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act") alleging that the responding party violated sections 17, 70, 72, 73 and 76 of the Act.

Background

2. The application concerns the unilateral removal by the responding party of three incumbents in two payroll positions identified in the collective agreement as bargaining unit positions. The responding party ("the City") purported to remove the incumbents - over the objection of the applicant union ("CUPE" or "the union") - on the basis that the incumbents were involved in matters of labour relations, and thus, pursuant to subsection 1(3)(b) of the Act, they were not deemed to be employees entitled to the protections of the Act.

3. At the outset of the hearing on January 7, 2009, the City moved that the application be dismissed on a preliminary basis for failing to disclose a *prima facie* violation of the Act. Upon consideration of the parties' submissions, I made an oral ruling dismissing the City's motion. I then commenced to hear the evidence and final arguments of the parties on the merits of the application.

The Evidence

4. I heard the testimony of John Martin, the City's Director of Human Resources, as well as that of the union's President, Krista Cowan. Mr. Martin has been in his position for about eight years. Ms. Cowan has been the union's President for the last two years, and has been active in the union in other roles over the past sixteen years. There were no material disputes of fact in their evidence.

5. The City employs close to 500 employees. CUPE represents about half of them, in a bargaining unit consisting of both inside and outside workers who work in or out of a number of facilities across the municipality.

6. At the point in time that the City stopped treating the three payroll incumbents as members of CUPE's bargaining unit, the City and the union were party to a collective agreement expiring on March 31, 2008. The recognition clause in that collective agreement excluded, among other positions, "all employees in the Human Resources Department (except Payroll Officer and Assistant Payroll Officer, who are members of the Bargaining Unit)".

Since 2002, the Human Resources Department has employed seven staff members, including the three payroll incumbents, all of whom report directly to Mr. Martin, who in return reports directly to the Chief Administrative Officer, Steve Hyndman.

7. Until recently, the Human Resources Department was located at City Hall. However, in a letter dated November 16, 2007 to Ms. Cowan, Mr. Martin advised the union that the Department was moving off site. Mr. Martin wrote:

> "Payroll staff were integrated into the Human Resources Department as part of a larger corporate reorganization in 2002. Notwithstanding that Human Resources staff regularly deal with highly confidential and personal labour relations information, it was agreed that Payroll staff would remain part of the CUPE bargaining unit.
>
> Unfortunately, efficient and effective working relationships between Payroll and other Human Resources staff have not been maximized under this arrangement. Preliminary plans are now underway to relocate the Human Resources Department off-site to new offices. Geographically separating this department from City Hall will exacerbate confidentiality concerns within the Department, and create an untenable mix of Union and Non-Union staff when dealing with labour relations issues.
>
> Please be advised therefore that Payroll staff will be designated as Non-Union staff effective the date of the move to the new Human Resources offices, and their job descriptions will be amended to recognize their increased exposure, involvement, and contributions to labour relations issues."

8. Ms. Cowan responded by letter dated December 20, 2007, as follows:

> "Further to your letter dated November 16, 2007 it is the Union's position that the work carried out by the payroll staff is bargaining unit work and are therefore covered in our scope.

> In order to change the scope of the collective agreement, proposals such as excluding current members from the bargaining unit need to be submitted during the next round of negotiations."

9. This prompted Mr. Hyndman, Mr. Martin's superior, to write the following December 21, 2007 response to Ms. Cowan:

> "Thank you for your letter dated December 20, 2007 regarding the Human Resources Department Reorganization.
>
> As indicated in John Martin's letter dated November 16th, Payroll staff are an integral part of the Human Resources Department, and increasingly are exposed to, involved with, and contribute to labour relations issues. In accordance with the Labour Relations Act, these positions are therefore excluded from collective bargaining.
>
> Please be advised that to immediately maximize the efficient and effective working relationships between Payroll and other Human Resources staff, Payroll staff will be designated as Non-Union staff effective January 2, 2008."

10. The City followed through with its plan to treat the payroll incumbents as non-union staff, commencing on January 2, 2008. They were provided new titles, new job descriptions, and a one or two per cent pay increase. The City stopped deducting union dues from their wages.

11. Mr. Martin testified about why the City unilaterally removed the payroll staff from the bargaining unit. He explained that since the payroll staff had been made part of the Human Resources Department, they had always performed functions which exposed them to matters of labour relations. However, according to Mr. Martin, as time went on, their labour relations activities expanded. He said the payroll staff were routinely consulted within their area of expertise on matters that touched upon the City's labour relations. He further testified that the City had concerns that when the Human Resources Department was to move to its new location, the payroll staff would be exposed to even more labour relations issues because the physical design of the new location was such that all the Department's staff would work together in one area, not separated by offices or walls. In addition, Mr. Martin testified that the most efficient and effective way for the Department to work was in a collaborative fashion, with everyone's input sought, including input on labour relations matters such as grievances, the preparation of collective bargaining proposals, and workplace policies and procedures. He testified that, since January 2008, the payroll staff provide suggestions with respect to management proposals for changes to the collective agreement.

12. On February 14, 2008, the union filed a grievance at the third step of the grievance procedure (with Mr. Hyndman) protesting the City's action in respect of the payroll staff, and requested by way of redress the return of the incumbents to the bargaining unit and payment of union dues from January 2, 2008.

13. The following day, CUPE filed this application.

14. By letter dated February 22, 2008, Mr. Hyndman informed Ms. Cowan that:

> "…

> Due to the extensive time lapsed as outlined above and in accordance with Article 6 of the collective agreement, I am not prepared to accept this grievance. Also, as you are aware, an Application under Section 96 of the Labour Relations Act has been filed and this is the appropriate place for this matter to be dealt with."

15. Mr. Martin agreed in the course of his cross-examination, that the City had in the past always agreed to extend time limits for the filing of CUPE grievances, but stated that those delays were always relatively brief (up to ten days), and that, in this case, the City considered the delay very lengthy.

16. A few days after Mr. Hyndman's letter, Ms. Cowan replied in writing requesting the City's agreement to extend the timelines for referring the grievance to arbitration. Eventually the parties came to an understanding the essence of which was that:

- the City would not continue to "refuse" the grievance based on timeliness;
- the issue of the payroll staff would be the subject of a City proposal in the upcoming collective bargaining for a renewal of the collective agreement; and
- the referral to arbitration would be placed in abeyance and any hearing in the unfair labour practice complaint scheduled after the collective bargaining.

17. When the parties commenced their collective bargaining on April 1, 2008, the City proposed the exclusion not only of the three payroll incumbents, but eleven other bargaining unit members. The union refused to agree to any of the proposed exclusions. Nevertheless, the parties reached a memorandum of settlement on July 28, 2008 setting out the terms for a new collective agreement, effective April 1, 2008. The new recognition clause continued to include in the bargaining unit the position of Payroll Officer and Assistant Payroll Officer, and to exclude the other staff of the Human Resources Department.

18. By letter dated August 27, 2008, CUPE's National Representative, Helen Gibb-Gavel, advised Mr. Hyndman that the union wished to proceed with the arbitration of the grievance, and proposed a total of three arbitrators for the City's consideration. Mr. Hyndman responded in writing on September 4, 2008, that the City would recommend engaging a mediator, Gerry Lee, prior to selecting an arbitrator. The collective agreement contained a provision dealing with mediation of grievances, and as a matter of practice the parties routinely agreed to mediation of grievances, and routinely used Mr. Lee in such a role. In fact, it was extremely rare that any grievances raised by CUPE were ever arbitrated.

19. On September 22, 2008, Ms. Gibb-Gavel advised Mr. Hyndman in writing that the City's proposal for mediation by Mr. Lee had been put to, and rejected by, the membership. She further indicated that the union expected a response regarding the three proposed arbitrators.

20. By letter dated September 26, 2008, Mr. Hyndman pointed out to Ms. Gibb-Gavel that Mr. Lee was scheduled to mediate a different grievance on January 15, 2009, and suggested to her that he could possibly assist in the payroll staff grievance. Apparently, the union communicated to the City that this suggestion was not acceptable, and the City consulted its legal counsel with respect to the grievance.

21. Nothing further developed with respect to the processing of the grievance until December 11, 2008, when new counsel for the City, Mr. Kees Kort wrote to Ms. Gibb-Gavel. (Mr. Kort took over the file from his partner, who had recently been appointed a Vice Chair of the Human Rights Tribunal of Ontario.) In his letter to Ms. Gibb-Gavel he asked her to consider a different individual to act as arbitrator in the payroll staff grievance.

22. As of the date of the hearing in this proceeding, the parties had not yet reached agreement on an arbitrator, but it was conceded by Ms. Cowan that the grievance was still proceeding to arbitration. In any event, she was aware that the union had had the option of applying under the Act for expedited arbitration if necessary.

23. In the course of her cross-examination, Ms. Cowan agreed with the suggestions of counsel for the responding party that, though she disagreed with the position of the City that the payroll staff were engaged in matters of confidential labour relations, she did not doubt the genuineness of the City's position on that issue. She agreed that, from her perspective, the City firmly believed that the payroll staff were engaged in labour relations issues that necessitated their removal from the bargaining unit, and that the City was not motivated by anti-union animus. She further agreed that relations between the City and CUPE were relatively satisfactory, and the lines of communication between them open. She characterized the City's position at the bargaining table for the renewal of the collective agreement as tough but not unfair.

Analysis and Conclusions

24. The provisions of the Act relevant to this dispute are:

> **17.** The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.
>
> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
>
> **72.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
>
> (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
>
> **73.** (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.
>
> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

25. The union contends that, when viewed as a whole, the actions of the City, including the removal of the payroll staff from the bargaining unit in early January 2008, the raising of the timeliness objection to the grievance, the change in the City's position concerning the appropriate forum for resolution of the union's concern, the tabling of a proposal in negotiations to remove fourteen positions from the bargaining unit and the City's responses (or lack thereof) to the union's proposed list of arbitrators after the new collective agreement was reached, constitute violations of the Act and disclose anti-union animus.

26. Much of the union's argument clearly lacks merit, having regard to the evidence. First of all, there is no dispute that the grievance was filed outside the time limits, and therefore the City was legally entitled to raise the issue of timeliness. The fact that the City had never before raised such an objection is irrelevant. Moreover, the uncontradicted evidence of Mr. Martin was that never before to his knowledge had the union delayed so long in filing a grievance with the City. Finally, and most significantly, the City changed its mind in any event, removing its objection and clearing the way for a consideration of the grievance on the merits.

27. Nor do I find any particular significance in the City's apparent change of heart regarding the proper forum for the resolution of the complaint regarding the payroll staff. The union chose to engage two different processes, first through the collective agreement grievance procedure, the other through an application before the Board. The City responded in a strategic way. In labour relations, there is nothing very surprising or disturbing about such a response, even if it appears on its face to be contradictory. In any case, it cannot be said that anything the City did blocked the union from proceeding in the manner it desired.

28. I turn to the union's concern with the proposal to remove fourteen positions from the bargaining unit. At no time in the hearing did Ms. Cowan or counsel for the union suggest that the City had no legitimate interest in advancing such a proposal. Furthermore, the proposal went nowhere, did not approach the point of impasse, and appears not to have had the slightest negative influence on the outcome of the negotiations, which, as I have pointed out, resulted in a memorandum of settlement satisfactory to both sides, and ultimately a collective agreement, without any labour

disruption. There simply is no merit to the union's allegation in this regard. Certainly, no violation of section 17 is disclosed by the evidence concerning the collective bargaining.

29. I hold a similar view of the union's concern regarding the City's reaction to the CUPE's proposal of arbitrators. The City responded twice by suggesting mediation. Mediation had been the established norm between these parties, whereas arbitration was the extreme exception. In any event, perhaps sensing that the union was in no mood to consider the City's suggestion, and after a change in legal counsel, the City responded with its own proposal for an arbitrator, and the matter is moving forward. Again, this kind of workplace interaction is typical of the ebb and flow of labour relations. It is a far cry from the situation in *London Salvage and Trading Company Limited*, [1991] OLRB Rep. Nov. 1291, a decision relied upon by counsel for the union, in which the Board found that the employer had set about to frustrate the reinstatement of a fired employee after the employer had entered into a settlement to reinstate the worker on certain terms. This the Board found to be a demonstrated and unacceptable disregard by the employer for the grievance and arbitration procedure. The City's responses to the union's proposal of arbitrators do not warrant a similar conclusion in this case.

30. I turn to the City's unilateral decision to treat the payroll staff as "non-union". Counsel for the applicant argued that there was no evidence whatsoever as to why the City decided to exclude those individuals from the bargaining unit. However, Mr. Martin explained why the City took that position. He said it had to do with the increased activity of the payroll staff over time in matters such as grievance administration, collective bargaining and policy development. It is perhaps true that Mr. Martin did not go into a great deal of detail concerning these activities, but then again, he was not particularly hard-pressed by either counsel in this area of his examination. In any case, Mr. Martin also explained that the move of the Human Resources Department to new premises had the effect of requiring the Human Resources staff to work together in an open area where privacy could no longer be guaranteed. Thus, the payroll staff were even more exposed to labour relations issues. Again, Mr. Martin was not strenuously challenged with respect to these assertions.

31. The union relies upon *Rexwood Products Limited*, [1987] OLRB Rep. Feb. 267 in support of its position that the City's decision to treat the payroll staff as non-union constitutes an unfair labour practice. However, in that case, the employer conceded that one of the reasons it purported to promote a bargaining unit electrician to a non-union supervisory position was its desire to pay the electrician more than the wage provisions of the collective agreement would allow, and thus ensure that he remained in the employer's workforce. In other words, the employer admitted to a wilful circumvention of the collective agreement. The Board found that the electrician was not, in fact, exercising managerial responsibilities in his new role, and that the employer had committed a violation of what is now sections 70 and 73(1) of the Act.

32. The City has not made a similar concession in this matter. In fact, the essence of the evidence of Mr. Martin, supported by the testimony of Ms. Cowan, is that the City had an honestly held belief that the payroll staff were engaged in activities that brought them outside the definition of "employee" in subsection 1(3) of the Act, and therefore justified their removal from the bargaining unit. Ms. Cowan did not agree with that position, but she did agree that the City acted out of a bona fide conviction. In her view, the City was not attempting to avoid the union or otherwise deprive it or the employees in question of any rights under the Act.

33. In *Hydro One Inc.*, [2005] OLRB Rep. Nov./Dec. 969, a case also relied upon by the union, the employer initiated a job evaluation process to re-rate four positions and their incumbents to managerial positions, thereby removing them from the bargaining unit on the eve of an anticipated work stoppage. The Board found there was no direct affirmative evidence of anti-union animus, but it went on to examine the leading cases on the extent to which anti-union animus is a necessary element of a finding of a breach of the Act. Commencing at paragraph 73, the Board wrote:

> 73. In *A.A.S. Telecommunications Ltd.* the Board stated that where there was actual, as opposed to "incidental", interference with a trade union, it was not necessary to establish anti-union animus in order to establish a breach of what is now section 70 of the Act (at paragraph 30). The Board stated:
>
> > 31. The essential element in any complaint under section 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only incidentally affects a trade union. The distinction, although only one of degree, is important because it takes into account the adversarial nature of collective bargaining. Given that the union and the employer are economic adversaries, the Board should not characterize the normal wear and tear of collective bargaining as constituting illegal interference. Conduct that threatens the formation or existence is quite a different matter, and would clearly amount to a contravention of section 56.
>
> 74. In *Skyline Hotels* the Board stated that proof of anti-union animus was required, but that it need not be the dominant purpose and further that affirmative evidence of anti-union animus was not required in every case: the adverse interference with a union of certain forms of conduct by an employer being so reasonably foreseeable that an employer will be presumed to have intended that consequence unless it comes forward with a credible business purpose to justify its conduct. In articulating this test, and giving a purposive meaning to the word interference, the Board specifically cited paragraph 31 of *A.A.S. Telecommunications Ltd.* (at paragraph 55). That is, interference that only incidentally affects the trade union does not give rise to the inference that the employer intended the consequence.
>
> 75. In *International Wallcoverings* the Board reviewed in detail the earlier decisions of the Board. The Board stated that in most cases the difference between the two approaches was more apparent than real, since "without direct evidence of motive, both approaches require a considerable imbalance of interests in favour of the protected activity before a violation will be established" (at paragraph 31). In reaching this conclusion the Board referred to paragraph 31 of *A.A.S. Telecommunications Ltd.*, and observed (at paragraph 28):
>
> > To ensure that the section did not prohibit all employer initiatives impeding union activity (no matter how bona fides) the Board read into the statute an exception for employer conduct "that only incidentally affects a trade union". In this manner the Board proposed, pursuant to section 64 [now section 70], to distinguish between legitimate and illegitimate management initiatives. Presumably an adverse impact on union activity would be characterized as "incidental" where, relying on its expertise, the Board accepted the employer's action as classic business or collective bargaining activity not inconsistent with the scheme of the Act. In effect, the Board would "balance" the conflicting interests of labour and management, honouring accepted relationships but being

> vigilant that intrusions on statutory entitlements have suitable justifications. …. However, we wish to stress that "the balancing" has been more one of examining the record for *a* legitimate management interest to support the adverse impact on union activity. It has not usually involved a delicate weighing of legitimate but conflicting interests with labour boards being the arbiters of the right policy mix. We know of no case in Canada or the United States in which a labour board has purported to balance a bona fides [sic] exercise of a managerial prerogative, for example, a layoff or subcontracting decision against its impact on union activity.
>
> [Emphasis in the original.]
>
> 76. From the forgoing, it is clear that only employer conduct that more than incidentally affects a trade union constitutes improper interference contrary to section 70 of the Act on either a non-motive approach or, in the absence of direct affirmative evidence of anti-union animus, a motive approach. In assessing the employer's conduct to determine whether it constitutes more than incidental interference with the trade union, the Board will consider whether there is an "imbalance of interests in favour of the protected activity" such as to warrant intervention by the Board. Without meaning to be either determinative or exhaustive, the following are arguably relevant considerations:
>
> a. Whether the conduct threatens the formation or very existence of a trade union;
>
> b. Whether the employer conduct is classic business activity, such as a bona fide exercise of a managerial prerogative, such as a lay off, or subcontracting decision; and
>
> c. Whether the employer conduct is collective bargaining activity, noting the conflicting interests of labour and management and the adversarial nature of collective bargaining.

34. The trade union in the *Hydro Once* case attacked the bona fides of the employer's decision. It argued that there was no need or plan to have re-rated the four positions, that the decision to do so just before an anticipated work stoppage was problematic, and finally, that the exclusion of the four positions had improved the employer's ability to weather the work stoppage. The Board rejected the first two prongs of the trade union's arguments, but accepted that the employer's ability to withstand the work stoppage had been improved by the reclassifications. Nevertheless, the Board concluded that there had been no breach of section 70 because, in a strike or lock-out situation, an employer and a union are entitled to position themselves optimally in the event of a work stoppage, subject to not otherwise violating the Act. Such positioning by one party necessarily affects the position of the other party. The Board reasoned therefore that the trade union could not complain of employer interference under section 70 merely because it had lost the opportunity to be in the best possible position to wage a strike.

35. In the matter before me, the union says that, regardless of the City's intentions, the union was rendered helpless in the eyes of the bargaining unit members by the actions of the City, and thus seriously undermined. I have little doubt the union was taken aback by the City's unilateral decision regarding the payroll staff. Frankly, the issue could have been handled differently. Once the union made it clear that it objected to the City's action, it may have made for better labour relations for the

City to apply to the Board under section 114 of the Act for a determination as to whether or not the payroll staff were employees within the meaning of the Act. On the other hand, the union itself could have made such an application as well. In any event, the union did not just acquiesce meekly. It invoked the grievance procedure and ultimately referred a grievance on the matter to arbitration. In my view, it was not seriously undermined by the City's unilateral action. The situation was no more serious than that faced by the trade union in the *Hydro One* case. To the extent there was any interference by the City, therefore, it only incidentally affected the union, and it does not give rise to an inference that the employer intended such a consequence.

36. For these reasons, I find no breaches of the Act.

37. The application is dismissed.

38. Given the result in this matter, the City is no longer required to file its written submissions in reply to the union's final oral argument.

1409-07-R; 2676-07-R Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 18, Applicant v. **City of Hamilton and Police Services Board (Hamilton),** Responding Party; Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 18, Applicant v. City of Hamilton, Responding Party

Related Employer – Sale of Business – The Hamilton Police Service Building was undergoing renovations – The Union filed related employer and sale of business applications regarding the City of Hamilton ("City") and the Police Services Board ("PSB") – The City was bound by the Union's provincial ICI Agreement – The Board dismissed the sale of business application because nothing was transferred from the City to the PSB – The Board found that the City and PSB were related employers because: 1) two legal entities existed; 2) although the City and PSB had different principal activities, the City was integrally and inextricably involved in the PSB's construction activities as it approved the PSB budget, maintained and administered the PSB's accounts, prepared the tenders, reviewed the bids, provided its expertise, issued a City vendor number, managed WSIB and insurance issues, handled contract revisions, organized contractor meetings, paid the contractor and was party to the construction contract; 3) the City exercised common control or direction of the construction activities, and four of the seven PSB members were City appointees; 4) there was a potentially valid labour relations reason for making the declaration as the renovations were done with non-union workers constituting a potential erosion of bargaining rights – The Board found, however, that the Carpenters cannot legally obtain the right to represent carpenters in the employ of the PSB, because s. 3(d) of the *LRA* excludes any such employees from the Act, and s. 117 of the *Police Services Act* operates as an additional bar given the Chief's lack of consent – Since s. 1(4) operates to preserve, not extend bargaining rights, and the Union could not obtain bargaining rights in the first place, no relief was granted – The applications were dismissed.

BEFORE: *Jack J. Slaughter*, Vice-Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

APPEARANCES: *Michael Church, Robert Yakiwchuk* and *Glenn Morrice* for the applicant; *Patrick Moran, Andre Gulabsingh, Alice Cioroianu* and *Tina Iacoe* for the City of Hamilton, *Marco Visentini* and *Ted Mason* for the Police Services Board (Hamilton).

DECISION OF THE BOARD; February 17, 2009

1. Board File No. 1409-07-R is an application under section 69 and/or subsection 1(4) of the *Labour Relations Act, 1995,* S.O. 1995 c.1 as amended (the "Act"). In this application Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 18 (the "Carpenters") seeks relief against the City of Hamilton ("the City") and the Police Services Board (Hamilton) ("the PSB").

2. Board File No. 2676-06-G is an application for the referral of a grievance to arbitration pursuant to section 133 of the Act filed by the Carpenters against the City.

3. The parties agreed that the Board should first hear and determine Board File No. 1409-07-R, and hold Board File No. 2676-06-G in abeyance. However, they further agreed that the evidence adduced in Board File No. 1409-07-R could be subsequently referred to and relied on in the Board's determination of Board File No. 2676-06-G. This decision deals only with Board File No. 1409-07-R.

4. The Board heard oral evidence from two witnesses in this related/successor employer application: Ted Mason, Chief Accountant for the PSB, and Tina Iacoe, Purchasing Analyst for the City. Both witnesses testified in a credible manner. The evidence of both witnesses was supplemented by a substantial body of documentary evidence that went in on consent of the parties. As a result, there is little dispute about the relevant facts. However, there is substantial dispute about the legal conclusions to be drawn from those facts.

5. The Board must resolve two issues in the disposition of this matter: 1) do the facts make out a case for successor employer and/or common employer relief under section 69 and/or subsection 1(4) of the Act? 2) does the Board have the jurisdiction to grant the relief sought by the Carpenters in light of the statutory limitations set out in the *Police Services Act*, R.S.O. 1990 c.P.15 as amended (the "PSA")?

THE FACTS

6. The documentary evidence adduced in this matter, and oral testimony of Ted Mason and Tina Incoe, taken together, provide a clear and comprehensive picture of the relationship between the City and the PSB, both on a general level, and with respect to the dynamics of the construction project that spurred the bringing of this application.

7. On a general level, the PSB operates in an independent way with respect to the provision of police services, while still being very closely integrated with and under the control of the City with respect to matters of finance, purchasing and infrastructure. The specific facts put into evidence demonstrate how this is the case.

8. The City is a municipality incorporated under the *City of Hamilton Act*, S.O. 1999, c.14. Pursuant to section 2 of that statute, the City is constituted as a "body corporate". The statute also

provides for the existence of various boards to carry on the City's business, including a board of health, a public library board, and a police services board. Section 6 of the *City of Hamilton Act* specifically makes the PSB the police services board of the City. The City's principal activity is the provision of municipal government services.

9. The City is bound by the Carpenters Provincial Construction Collective Agreement applicable to work performed in the industrial, commercial and institutional sector of the construction industry ("the ICI Agreement") pursuant to a certificate of the Board issued to the applicant on September 12, 2005. That certificate was subject to a judicial review application at the time these matters were heard. However, the Union's certification has now been confirmed to be in full force and effect. The Divisional Court dismissed the City's judicial review application: see *City of Hamilton,* [2008] OLRB Rep. Nov./Dec. 859 (Nov. 5, 2008). The City subsequently filed and then abandoned a Notice of Appeal to the Ontario Court of Appeal. The current ICI Agreement is effective until April 30, 2010.

10. The PSB is a municipal police services board created under the PSA. Its responsibilities are enumerated in section 31 of the PSA as follows:

> **31.** (1) A board is responsible for the provision of adequate and effective police services in the municipality and shall,
>
> (a) appoint the members of the municipal police force;
>
> (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
>
> (c) establish policies for the effective management of the police force;
>
> (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;
>
> (e) direct the chief of police and monitor his or her performance;
>
> (f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;
>
> (g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);
>
> (h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;
>
> (i) establish guidelines for dealing with complaints made under Part V;
>
> (j) review the chief of police's administration of the complaints system under Part V and receive regular reports from the chief of police on his or her administration of the complaints system.

> (1.1) Guidelines in respect of complaints made by members of the public under Part V shall not be established by the board unless they are consistent with,
>
> (a) any procedural rules or guidelines for the handling of public complaints established under clause 56(1)(b) by the Independent Police Review Director; and
>
> (b) any procedure, condition or requirement made by regulation under paragraph 26.4 of subsection 135(1).
>
> (2) The members of the police force, whether they were appointed by the board or not, are under the board's jurisdiction.
>
> (3) The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.
>
> (4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.
>
> (5) The board shall ensure that its members undergo any training that the Solicitor General may provide or require.
>
> (6) The board may, by by-law, make rules for the effective management of the police force.
>
> (7) The board may establish guidelines consistent with section 49 for disclosing secondary activities and for deciding whether to permit such activities.

Pursuant to section 30 of that statute, the PSB may "contract, sue and be sued in its own name".

11. Four of the seven PSB members are appointed by the City. The remaining three PSB members are appointed by the Government of Ontario. Three of the four City appointees are representatives of City Council, while the fourth is a citizen appointee.

12. The PSB prepares a budget on an annual basis. Budget estimates are put together at the inspector, superintendent and Deputy Chief levels. Next the Chief makes his final additions and subtractions from the estimates. Then the estimates are forwarded to the PSB's Budget Steering Committee for a comprehensive line by line review. Thereafter, the Budget Steering Committee submits the budget to the PSB for its approval. Lastly, the PSB submits the budget to City Council for its approval. While the Chief has the right to challenge any decision of City Council on the approval on the PSB Budget to the Ontario Civilian Commission on Police Services under section 39 of the PSA, this has not occurred in recent times, if at all. The PSB is allowed to retain any budget surpluses for its own use. Those surpluses are not returned to the City.

13. The PSB does not have its own bank accounts. All of the PSB's accounts and budget are set up and maintained as part of the City's financial system. The PSB's annual financial statements are part of the City's annual financial statements, and are consolidated into them in the City's annual financial reports.

14. The construction project that led to the filing of this application was the renovation of the third floor of the Hamilton Police Service Building at 155 King William Street in Hamilton. This project was generated as a result of the Chief identifying a need for renovations at the central station. The Chief earmarked financial resources from the PSB's capital reserves for this purpose. The project was assigned to Don Bowman, the PSB's Manager of Fleet and Facilities. Mr. Bowman became the Project Manager for the renovations. He proceeded to collect quotations from architectural firms for drawings for the project. Mr. Bowman worked on a limited pre-approved budget, which was charged to the PSB's accounts with the City.

15. After Mr. Bowman had done the preliminary work, the Chief presented a full proposal for the renovations to the PSB for approval. The PSB approved the project, and gave it the green light. Once that was done, the Rubicon had been crossed, and the City became fully involved in the Project.

16. Mr. Bowman took the specifications for the project to Nadine Kelly, a Buyer in the City's Purchasing Department. Ms. Kelly prepared the tender documents. All bids for the project came back to the City's Purchasing Department, which reviewed the bids for compliance. The City also answered any questions builders had about the tender documents. After all bids were in, the City disclosed them to Mr. Bowman, who recommended a successful bidder to the Chief, which was subsequently approved for the final go ahead by the PSB. In his testimony, Mr. Mason conceded that the PSB relied on the City's expertise throughout the process, including the City's previous experience with the successful bidder.

17. The City remained fully engaged in all aspects of the project, with Ms. Kelly working in close conjunction with Mr. Bowman. In fact, all documentation is in the name of the City, and none of it is in the name of the PSB. More specifically, the City issued the tender; issued the purchase order; set up the successful bidder with a vendor number on the City's purchasing system; took care of all WSIB and insurance issues; handled contract revisions, organized contractor meetings; and paid the contractor. The City is shown as the Project Owner in a May 29, 2006 CMD Keyfax Report. The successful bid was submitted on a City of Hamilton Tender Form. The list of bidders was posted on the City website. Finally, and most importantly, the construction contract was signed between the subcontractor Gen-Pro and the City.

18. Mr. Bowman oversaw the renovations and dealt with technical issues in the field. He determined if the work was satisfactory, and so advised Mr. Mason. Payment for the work was therefore authorized by Mr. Mason of the PSB, but payment was made by the City to Gen-Pro via the City's Accounts Payable Department. The Police Station itself is owned by the City.

19. There are a few more significant facts of a general nature to be gleaned from the testimony of Mr. Mason. The PSB has no carpenters or other tradespersons on staff. The Chief has not consented to any trade union representing employees of the PSB other than the Hamilton Police Association, which represents a civilian unit, a Sworn Officers Unit and a Senior Officers Unit. For all the PSB's construction projects, the funds come from the City's tax base and user fees. Similarly, the City holds and issues all monies, and facilitates and signs all contracts and purchase orders for those projects. Project documents go to the City and not to the PSB's legal counsel. Mr. Mason had no knowledge of the grievance relating to the above-described renovations at the time they were going on.

20. More strikingly, when the Hamilton Mountain Police Station was built at a cost of $10,000,000.00 in 2004, the City paid for the entirety of the project and did all the contract administration. The PSB's involvement was limited to such an extent that Mr. Mason could not identify the general contractor for this multi-million dollar job in his initial cross-examination on the first day of hearing. On the second day of hearing, Mr. Mason agreed with counsel for the Carpenters' suggestion that the general contractor was Derbtile, and that he had no reason to disagree that the project was "wall to wall union".

21. The foregoing are the significant facts pertaining to the project that gave rise to this application. There are no material discrepancies between the testimony given by Mr. Mason and Ms. Iacoe. Nor is there any material discrepancy between their oral testimony and the documentary evidence before the Board. Neither Dan Bowman nor Nadine Kelly were called to give evidence despite their more direct involvement in the project, but we find that their relative roles were clearly described in the evidence before us, and those roles are not in dispute. Therefore, we find that we have an adequate factual foundation to decide the related/successor employer application.

LEGAL ARGUMENT

22. The PSB argues it is a separate entity from the City and operates under a separate statute. The PSB's constitution and funding process are governed by the PSA. The legal mandates of the PSB and the City are separate and distinct, although there is a funding relationship between them. They are not under common direction and control. Nor are they engaged in associated or related activities. The PSB's labour relations are governed by the PSA and not the Act. Therefore, the PSB does not fit within the related or successor employer provisions of the Act in its relationship with the City.

23. The City engaged in a detailed statutory analysis of the PSA. In particular, the City emphasized the specific regime for labour relations established under Part VIII of the PSA. The City argued that the granting of a related employer declaration would compel the PSB to recognize the Carpenters as the bargaining agent for certain PSB employees in direct and unavoidable breach of section 117 of the PSA and clause 3(d) of the Act.

24. In these circumstances, the City asserts the Board is without jurisdiction to grant the relief requested by the Carpenters. The City maintains that the Carpenters could not legally certify the PSB's employees, and should not be permitted to do an "end run" around the PSA's statutory regime for the purpose of enforcing the subcontracting provisions of the ICI Agreement.

25. The City submitted the following authorities on the jurisdictional issue: *Dryden (City)*, [2005] OLRB Rep. Sept./Oct. 767 (Sept. 22, 2005); *Tillsonburg (Town)*, [2003] O.L.R.D. No. 3622 (Oct. 21, 2003); *Tina Rozich* Board File No. 1468-00-U, dated November 24, 2000; *Dickson*, [2006] B.C.H.R.T.D. No. 290 (June 16, 2006); *Reid* v. *Vancouver Police Board*, [2005] B.C.J. No. 1832 (C.A.) (Aug. 18, 2005).

26. On the related employer issue, the City argued that there is no valid labour relations reason for granting such a declaration because the Board cannot protect against the undermining of bargaining rights where the Carpenters could not legally obtain those bargaining rights in the first place. In any event, the City urges the Board to find that the control and direction of the City and the PSB is separate. For all those reasons, the Carpenters' application should be dismissed.

27. The Carpenters assert that the Board does have the jurisdiction to grant the relief sought. The Carpenters say there is no conflict between the ICI Agreement and the PSA or any of the Hamilton Police Association collective agreements. The Carpenters state they are only seeking to have the terms of the ICI Agreement apply when the City and the PSB are doing work under the ICI Agreement.

28. The Carpenters aver that they were proceeding with a straightforward grievance against the City for subcontracting work non-union in 2006, until the City belatedly raised the issue of the PSB being the contractor or owner-client. The Carpenters point out that all documentation around the bidding process and with the subcontractor is in the name of the City, and none of it is in the name of the PSB. The Carpenters claim the City and the PSB have structured their affairs to act as one entity for the purpose of construction labour relations. Hence, the Carpenters maintain the relief they seek is warranted.

29. The Carpenters say that the testimony of Mr. Mason describes a "smooth and seamless" relationship between the PSB and the City. They note that neither Don Bowman nor Nadine Kelly were called as witnesses, despite their direct involvement with the project at issue. The Carpenters assert that a review of all the oral and documentary evidence amply reveals common control and direction pertaining to the construction activities of the City and the PSB. They say that is the very type of mischief for which the related employer provisions were enacted. The PSB is under the control of the City. The associated or related activities are the construction of police facilities. The City and the PSB are in a totally interdependent relationship, and there is no reason not to issue a related employer declaration.

30. The Carpenters advance the following authorities in support of their position: *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. Dec. 1724; *Donald A. Foley Limited*, [1980] OLRB Rep. April 436; *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176; *The Georgian Construction Company Limited*, [1995] OLRB Rep. March 354; *United Shelters Ltd.*, [1981] OLRB Rep. June 796; *Royal Taxi*, [1999] OLRB March/April 324.

31. The Carpenters state that the relationships at issue here are outside the scope of the PSA, which the Carpenters describe as a "red herring". The Carpenters urge a common sense reading of the statutory provisions to avoid a conflict. In the alternative, if the Board finds there is a conflict, the Board can devise a remedy which would provide for the application of the ICI Agreement to the PSB's activities, subject to modifications where necessary to comply with the strictures of the PSA.

32. In reply, the City states that the ICI Agreement is a Provincial Collective Agreement between a designated Provincial Employer Bargaining Agency and a Provincial Employee Bargaining Agency, so "either it applies or it does not". Even one hour of ICI carpentry by the PSB flies in the face of the PSA and the Hamilton Police Association Civil Unit collective agreement. As counsel graphically put it, "you cannot be half pregnant".

33. The City asks that the Board note the difference between the facts necessary to prove related employer status as opposed to the facts needed to prove a violation of the subcontracting provisions of the ICI Agreement. The City referred the Board to the decisions in *Corporation of the City of Hamilton*, Board File No. 0089-01-PS, dated March 7, 2003; and *Etobicoke Public Library Board*, [1989] OLRB Rep. Sept. 935.

34. In its reply, the PSB says that Messrs. Mason and Bowman made payment authorization decisions, and that the PSB's actors were independent of the City, negating the common control criterion. The Board permitted surreply by the Carpenters on the applicability of the *Etobicoke Public Library* decision only. Not surprisingly, the Carpenters argued that it was factually and legally distinguishable.

ANALYSIS AND DECISION – RELATED/SUCCESSOR EMPLOYER CRITERIA

35. The applicant has applied for relief under section 69 and subsection 1(4) of the Act. While the sections are complementary and both serve the overall statutory goal of preventing the erosion of a trade union's bargaining rights in cases of business and government reorganizations, the two provisions operate quite differently.

36. A "sale of a business" under section 69 of the Act requires the "transfer from the predecessor of the essential elements of the business as a block" or the "transfer of a coherent and severable part of the predecessor's economic organization": *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193.

37. In this case, there is no evidence of the transfer of anything from the City to the PSB.

38. Accordingly, the application under section 69 of the Act is dismissed.

39. There are five prerequisites for a common employer declaration under subsection 1(4) of the Act. Firstly, there must be more than one entity. Secondly, the entities must carry on associated or related activities. Thirdly, their activities must be carried on under common direction or control. Fourthly, there must be a valid labour relations reason for making the declaration. Finally, the Board must consider the application of subsection 126(3) of the Act.

40. In this case, the first criterion is met in that the City is a city incorporated under the *City of Hamilton Act*, S.O. 1999, c.14, and the PSB is municipal police services board created under the PSA. Therefore, two legal entities exist in this case.

41. When dealing with the associated or related activities criterion, the Board will not readily hold that construction work spanning various sectors, subdivisions, phases or specialized aspects is "unrelated" work for the purposes of subsection 1(4) - particularly where the work is undertaken at the same time and involves common managerial or employee skills: *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720 at paragraph 20.

42. In respect of the construction activities undertaken in this case, the evidence does support the conclusion that the City and the PSB are engaged in associated or related activities.

43. The principal activity of the City is the provision of municipal government services, while the PSB's principal activity is the provision of police services. However, those broad-based descriptions of the principal activities of the two entities do not capture the activities that are truly at issue in this case. The Carpenters' focus is neither on the general provision of municipal services, nor on the provision of police services. The Carpenters' interest is in those activities that pertain to the new construction, repair and renovation of police stations and facilities. Where the bargaining rights at issue are construction industry bargaining rights, the appropriate focus is on the construction

activities of the entities in question, and not on activities unrelated or tangentially related to construction: *Mastercraft Homes Windsor Inc.* (2007) 135 C.L.R.B.R. (2d) 45 (Ont.) (March 28, 2007). The British Columbia cases relied on by the Employer are distinguishable in that they pertain to operational, rather than construction activities.

44. More specifically, the City is integrally and inextricably involved in all construction activities undertaken by the PSB. The money to fund the construction activities is found within a PSB budget approved by City Council. All of the PSB's accounts are maintained and administered by the City. For the renovation project in question, the City prepared the tenders, reviewed the bids for compliance, and provided expertise on its previous experience with the successful bidder to the PSB.

45. After the awarding of the contract to the successful bidder, the City set up a vendor number in the City's accounting system for that bidder, took care of all WSIB and insurance issues, handled contract revisions, organized contractor meetings and paid the contractor. The Police Station where the renovations were conducted is owned by the City. Finally, and perhaps most importantly, the actual construction contract was between the successful bidder and the City.

46. It is true that the PSB initiated the renovation project, and through Mr. Bowman in the field and Mr. Mason in the office, oversaw technical issues and recommended approval of periodic payments to the contractor. However, those limited but important functions do not detract from the clear and inescapable conclusion that the City and the PSB worked hand in hand in associated or related activities pertaining to the construction work done on the Hamilton Police Service Building renovation project.

47. The same facts support a finding of common control or direction. Four of the seven PSB members are appointed by the City. This is only one relevant point, though. The City's dominant role in budgeting, accounting, the bidding process, the post-bidding contract administration process, and the payment of the contractor all support a finding that there was common control or direction of the construction activities by the PSB and the City.

48. Furthermore, there is a potentially valid labour relations reason for making the declaration sought by the Carpenters. The Hamilton Police Service Building renovations were done with non-union forces, which would constitute a potential erosion of the Carpenters' bargaining rights and collective agreement with the City (assuming the Carpenters' bargaining rights are not circumscribed by the provisions of the PSA). Subsection 1(4) of the Act exists to protect a trade union's bargaining rights: *Brant Erecting*, [1980] OLRB Rep. July 945.

49. Section 126(3) is not applicable on the facts of this case as the Carpenters do not rely upon a blood relationship or the presence of a key individual to support their claim for a subsection 1(4) declaration.

50. For the foregoing reasons, the Board finds that the Carpenters have satisfied the prerequisites for a subsection 1(4) declaration concerning the construction activities of the City and the PSB, subject to the resolution of the issue pertaining to the alleged statutory limitation upon the Board's jurisdiction set out in the PSA.

ANALYSIS AND DECISION – PSA ISSUE

51. The PSA establishes a well-defined regime governing the provision of police services in the Province of Ontario.

52. Under subsection 4(1) of the PSA, the City is required to "provide adequate and effective police services in accordance with its needs". Subsection 4(3) of the PSA makes the City responsible for "providing all the infrastructure necessary" for providing police services "including vehicles, boats, equipment, buildings and supplies".

53. Pursuant to the operation of sections 2, 5 and 27 of the PSA, the City has established the PSB as part of its statutory mandate to provide the required adequate and effective police services. The PSB is the civilian body which governs the Hamilton Police Service. The City appoints 4 of the PSB's 7 members – 3 representatives of City Council and 1 citizen appointee. The remaining 3 members are appointed by the Government of Ontario.

54. Section 31 of the PSA defines the responsibilities of a police services board. The effect of Section 31 is to entrust the day-to-day operations of police services in Hamilton to the PSB and the Chief of Police. Under section 39 of the PSA, the City must provide an appropriate budget for the provision of police services. The evidence in this case indicates that it has always done so.

55. Part VIII of the PSA specifically addresses the topic of "Labour Relations". The most significant provision therein is section 117, which reads as follows:

> **117.** A member of a police force shall not become or remain a member of a trade union or of an organization that is affiliated directly or indirectly with a trade union, unless the membership is required for secondary activities that do not contravene section 49 and the chief of police consents.

56. There is no issue that the Chief of Police has not consented to the representation of any employee by the Carpenters. The Hamilton Police Association does represent three bargaining units of PSB employees: a Sworn Officers Unit, a Senior Officers Unit, and a Civilian Unit. However, the PSB does not employ any carpenters directly either inside or outside those units.

57. The City argues that section 117 of the PSA constitutes a direct and impermeable roadblock to the relief sought by the Carpenters. The City says that to grant section 1(4) relief in this case would compel the PSB to recognize the Carpenters as the bargaining agent for certain of PSB's employees in direct and unavoidable contravention of section 117. It argues the Board has no jurisdiction to make an order that would violate section 117. The Carpenters could not certify the PSB's employees directly due to clause 3(d) of the Act, which excludes members of a police force within the meaning of the PSA from the coverage of the Act.

58. The Carpenters assert there is no conflict between the relief sought and section 117 of the PSA. In the alternative, the Carpenters ask that the Board "read down" the relief in this case to only apply to the construction subcontracting activities of the City and the PSB.

59. In reply to that argument, the City maintains that to accede to the Carpenters' alternative position would lead to the unacceptable and illogical result of the City being bound to only part of the

ICI Agreement in violation of the recognition clause thereof, and section 162 of the Act. The latter provision stipulates that there is to be no other agreement than the ICI Agreement applicable to work in the ICI sector of the construction industry.

60. The Board is faced with two serious jurisdictional obstacles in this case. Under clause 3(d) of the Act, members of a police force within the meaning of the PSA are excluded from the Act. Pursuant to section 2 of the PSA, the term "member of a police force" includes employees of a municipal police force who are not police officers. Hence any carpenters who might be directly employed by the PSB would be members of a police force for the purposes of the PSA.

61. In previous cases, the Board has relied on the cumulative effect of these statutory provisions to decline to certify crossing guards employed by a police force (*Dryden supra*) and to decline to hear duty of fair representation complaints made by members of a police force (*Tillsonburg, Tina Rozich supra*). For these reasons, it is clear that the Carpenters could not certify the PSB under the Act if it directly employed carpenters due to the statutory limitation prescribed by clause 3(d) of the Act.

62. Can the Carpenters nevertheless obtain subsection 1(4) relief on the facts of this case? The Board must conclude that they cannot obtain such relief. Subsection 1(4) operates to preserve, and not extend, bargaining rights. The Carpenters cannot legally obtain the right to represent carpenters in the employ of the PSB, because section 3(d) of the Act excludes any such employees from the Act should they ever be employed. Furthermore, section 117 of the PSA operates as a further and separate bar given the Chief's lack of consent under the PSA.

63. We find it would not be appropriate to fracture the ICI Agreement such that only the subcontracting provision would apply to the City and the PSB. Not only would this arguably run afoul of section 117 of the PSA, but it would be completely contrary to the spirit and intent of the ICI provisions of the Act. The Province-Wide Bargaining provisions of the Act are designed to ensure there is one complete collective agreement in place for each trade in the ICI sector in the Province of Ontario: see generally *Clarence H. Graham Construction Ltd.*, [1981] OLRB Rep. Sept. 1195; *Duron Ottawa Ltd.*, [1983] Rep. Oct. 1639. Other agreements or arrangements are specifically prohibited by section 162 of the Act.

64. Simply put, we do not find it appropriate to utilize section 1(4) to make an employer subject to the subcontracting provisions of a provincial construction collective agreement where the applicant trade union could not obtain bargaining rights for the direct employees covered by that trade union's collective agreement. We believe this would be stretching the application of subsection 1(4) to an extent beyond its intended application, which is to preserve bargaining rights and prevent their erosion. There can be no erosion where the trade union could not obtain these bargaining rights in the first place. In this case, the Carpenters have lawfully obtained the bargaining rights for the City's carpenters, but cannot lawfully obtain bargaining rights for any carpenters who might be employed by the PSB. The Carpenters' remedy, if any, lies in the Carpenters' grievance against the City. Given the factual findings above, the Carpenters may well succeed in their grievance, but that issue remains to be resolved in the grievance referral.

65. For the foregoing reasons, we find that we are without jurisdiction to grant subsection 1(4) relief in this case due to the combined operation of sections 3(d) and 162 of the Act, and section 117 of the PSA.

66. Accordingly, the Board hereby dismisses the Carpenters' application in Board File No. 1409-07-R.

67. The Board directs the Registrar to schedule one day of hearing to deal with any further evidence and representations the parties wish to make in respect of the grievance referral in Board File No. 2676-06-G.

68. This panel is seized of Board File No. 2676-06-G.

4028-06-R International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Applicant v. **Falls Management Company and/or Complex Services Inc. cob as Casino Niagara**, Responding Party

Bargaining Unit – Certification – Practice and Procedure – Representation Vote – Stay – After determining the status of one individual, the Board agreed to stay the counting of the ballots, pending its determination of a reconsideration request by the employer concerning the status of the disputed individual – After denying the employer's reconsideration request, the employer asked the Board to continue the stay pending its judicial review application – The Board decided it would be inappropriate to stay the counting of the ballots primarily for practical reasons: if the union were to win the vote, there remained significant litigation, and if they lost the vote, the application would come to an end – Furthermore the application was already significantly delayed and there was no significant prejudice to the employer or employees if the ballots were counted and the Board's decision was later overturned – Matter referred to Manager of Field Services to count ballots

BEFORE: *Brian McLean*, Vice-Chair and Board Members *R. O'Connor* and *S. McManus*.

DECISION OF THE BOARD; February 3, 2009

1. This is an application for certification. This matter has been ongoing for some time. There are disputes over the composition of the bargaining unit which, to date, are responsible for much of the delays in having the matter determined. The employer has requested that the Board delay the matter further because it has filed a judicial review of one of the Board's decisions in this application and wishes to have the Board stay its proceedings while awaiting the outcome of the judicial review. The facts which give rise to this request are as follows.

2. In its response to the application for certification, the employer gave the Board notice under s. 8.1 of the Act that it disagreed with the applicant's estimate of the number of employees in the bargaining unit. The Board was unable to resolve the s. 8.1 application without a hearing and as a result the ballot box was sealed and the ballots cast not counted after the vote was held.

3. The s. 8.1 dispute in this case is unusual. Normally, s. 8.1 disputes arise when the employer asserts that there are more employees in the bargaining unit applied for than what the union says there are. Here, it is the opposite. The employer asserts that there are fewer employees in the

bargaining unit than the union does. The dispute arises because the unit applied for – all stage employees – is a craft unit, and the union takes the position that audiovisual technicians are part of the craft while the employer disagrees.

4. The Board engaged in certain proceedings with a view to determining whether the s. 8.1 issues might be resolved so that at least some of the ballots could be counted. By decision dated July 3, 2008 the Board determined the status of two individuals, one of whom was an employee in the bargaining unit with a right to cast a ballot in the vote and one who was not. As a result of that decision, the Board directed that certain ballots be counted.

5. The employer disagreed with the Board's decision on one of the status disputes. It sought reconsideration of the Board's decision. While the parties filed submissions with respect to the request for reconsideration, the Board stayed the counting of the ballots. By decision dated November 19, 2008 the Board dismissed the request for reconsideration and ordered the ballots counted.

6. The employer then advised the Board that it was pursuing a judicial review of the Board's decisions. It asked the Board to stay the counting of the ballots pending the judicial review. The Board invited the parties to file submissions with respect to this issue. The parties filed submissions regarding the stay which the Board has considered in coming to this decision.

Decision

7. There is no dispute that the Board has the authority to defer consideration of an application pending a judicial review of its decision. (See *Cedarvale Tree Services Ltd.* and *Labourers' International Union of North America* [1971] 3 O.R. 832 at paragraph 25.)

8. In general the Board has, for many good policy reasons, tended not to delay its own proceedings while awaiting the outcome of [illegible] judicial review application. However, each situation must be determined on its own facts.

9. After careful consideration of the circumstances in this case we have determined that it would be inappropriate to stay the counting of the ballots pending the employer's judicial review of the Board's decision. There are several reasons for coming to this conclusion.

10. First is a recognition of where the parties are in the process. The Board's decisions which are under attack deal with one small piece of the litigation. As a result, if the ballots are counted and the union wins the vote, the matter is not over. There remains significant litigation to take place regarding whether audiovisual employees are included in the craft of stage employees.

11. On the other hand, the union advised the Board that if it is unsuccessful in the vote it accepts that its application will come to an end. Therefore, counting the ballots could lead to the conclusion of this matter, obviating the need for further days of hearing at the Board and ending the need for the judicial review of the Board's decision to proceed.

12. These practical concerns arise in a context of significant delays in this application. The application was filed on March 20, 2007. Therefore, nearly two years have passed since the employees voted and the ballots still have not been counted. The mere fact that the Board is

considering the employer's request that the ballots not be counted has already resulted in the cancellation of a hearing day. This is an extremely undesirable outcome.

13. While it is true that the union cannot be certified until it is licensed to represent employees in casinos, as noted, there is still a considerable litigation to be conducted at the Board until we arrive at that stage – litigation that is being disrupted because the results of the vote are not known. Moreover, if the union loses the vote the one year bar against any union applying again will only then begin to run.

14. Finally, we recognize the employer's concern that the sealed ballot box cannot be put back into place if the ballots are counted. However, no significant prejudice occasions to either the employer or the employees if ballots are counted and the Board's decision is later overturned.

15. On balance, therefore, we are persuaded that counting ballots is appropriate here. The matter is referred to the Manager of Field Services so that the ballots can be counted.

1804-08-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Four Seasons Site Development Ltd.**, Responding Party

Bias - Certification – Construction Industry – Membership Evidence – Natural Justice – Reconsideration – The employer sought reconsideration of a decision certifying the union, alleging that the Board had permitted the union to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act or the Board's Rules, and that the Board had denied the employer natural justice when the Board failed to advise the employer of the union's alternative positions with respect to the membership evidence (the union filed two lists, one with 12 names and the other with 6 and said it would rely on the latter evidence if the employer claimed or the Board found that any of these individuals were in the bargaining unit) – The Board held that there is nothing in the Act or Rules that would preclude an applicant union from filing an additional list of persons it believes are not employees, together with membership evidence on their behalf, in case the responding party identified them as working in the bargaining unit on the application date – There was no denial of natural justice because the employer is required to provide a list of employees in the bargaining unit and that list cannot be affected by the union's estimate of the size of the bargaining unit or the quantum of membership evidence it files with its application – Similarly, there was no apprehension of bias – Request for reconsideration dismissed

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: January 26, 2009

1. The Board certified the applicant under section 128.1(13)(a) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in its decision dated November 19, 2008. The responding party requested the Board reconsider that decision in an application for reconsideration made on December 23, 2008. The Registrar pursuant to Rule 3.2 of the Board's Rules of Procedure extended the time under Rule 18.3 for making the reconsideration request to December 23, 2008.

2. The responding party filed detailed submissions in support of its request. The Board did not invite the applicant to make submissions in response as the Board was satisfied it could deal with the request without hearing from the applicant.

3. The responding party contends the Board permitted the applicant to rely on membership evidence that was not submitted to the Board in a manner permitted by the Act and the Board's Rules and more importantly, contends the Board denied natural justice to the responding party when it failed to disclose to the responding party that the applicant had filed positions in the alternative when that was not apparent on the face of the application, and that the manner in which the Board processed and determined this application raised a reasonable apprehension of bias.

4. The Board in its November 19th decision noted the applicant had filed two distinct groups of membership evidence with its application. The applicant stated in its Declaration Verifying Membership Evidence, Construction Industry (Form A-74) that it was filing membership evidence on behalf of twelve persons who it believed were employees in the bargaining unit it had proposed in its application. (The responding party agreed to the bargaining unit proposed in the application.) In its application it estimated there were twelve employees in the bargaining unit. In addition, the applicant had filed another group of membership evidence on behalf of six persons it believed were not employed in the bargaining unit on the application date. In its Form A-74 it indicated that if the responding party claimed or if the Board found that any one or more of those six persons were employed in the bargaining unit, it was relying on that additional membership evidence. In addition to filing two groups of membership evidence, it had also filed two lists of names; one with 12 names and the second with 6 names. The 12 names on the first list corresponded with the 12 names on the membership evidence filed by the applicant on behalf of the persons the applicant asserted were employed in the bargaining unit. The 6 names on the second list corresponded with the membership evidence filed by the applicant on behalf of the persons the applicant believed were not employed in the bargaining unit on the application date, but might be claimed to be in the unit by the responding party or be found by the Board to be in the bargaining unit.

5. The applicant in its application had listed six projects where it says the responding party was working on the application date and asserted there were twelve employees at work in that unit on the application date. The responding party in its response had listed eight projects, six of which were on the applicant's list of projects. The responding party in its response claimed there were either 25 or 31 construction labourers at work in the bargaining unit on the application date.

6. The Board in its November 19th decision noted the applicant and responding party had agreed to a list of persons the responding party asserted were employees in the bargaining unit containing 32 names. The applicant had challenged 9 of those 32 persons on various grounds, including they exercised managerial functions, or were not employed by the responding party, or were not performing the work of a construction labourer on the application date. The responding party had challenged one person, but subsequently agreed that person was indeed at work in the bargaining unit on the application date.

7. When the Board reviewed the parties' status submissions, the list of employees the responding party agreed were in the bargaining unit, the applicant's challenges to the responding party's list and the membership evidence filed by the applicant, it determined that it was unnecessary to deal with any of the challenges made by the applicant to the list. The Board wrote in its November 19th decision:

> …even if the responding party were successful in establishing all nine persons the applicant challenged were in fact employees in the bargaining unit on the application date, the applicant would nevertheless have filed membership evidence on behalf of more than 55 per cent of the employees in the bargaining unit.

As a result, the Board certified the applicant pursuant to section 128.1(13)(a) of the Act.

8. The responding party in its submissions in support of its reconsideration request argues the applicant cannot rely on the membership evidence on behalf of persons who it does not believe are employees in the bargaining unit. The responding party submits the Act does not contemplate an applicant union taking alternative or contingent positions relating to its estimate of the number of employees in the bargaining unit. The responding party contends the Act "does not contemplate that the Union can take positions in its application, *upon which the Employer must rely,* and then alter those positions depending on what is contained in the Employer's response." [emphasis added]

9. The responding party does not, in its submissions, articulate how an employer "must rely" on the trade union's estimate of how many employees are in the proposed bargaining unit when preparing its response. In my opinion, the number of employees an applicant union estimates are in its proposed bargaining unit is neither relevant nor material to an employer determining which of its employees come within the bargaining unit proposed in an application.

10. An employer is required by section 128.1(3)(a) of the Act to provide the names of the employees who come within the bargaining unit proposed in the application. The employer will or should know who it employs and what work they do. The work an employee performed on the date the certification application was filed and that employee's classification, duties and responsibilities are the only relevant factors in assessing whether someone comes within the bargaining unit proposed in a certification application, particularly when the employer agrees with the description of that bargaining unit. Surely the responding party is not suggesting in its submission that it would tailor the list of names it provides to the Board under section 128.1(3)(a) of the Act based on the number of employees the applicant estimated were in the bargaining unit.

11. The responding party contends it is inconsistent with the Act, the Board's Rules and the Form A-74 for a union seeking certification to file, in addition to a list of members in the proposed bargaining unit and the membership evidence on behalf of those individuals, a list of union members who it does not believe are in the bargaining unit and membership evidence relating to those persons. The responding party submits sections 7(12) and 7(13) when read together with section 8(3) clearly contemplate that a union will file just one list of union members who it believes are in the bargaining unit and membership evidence on behalf of only those persons.

12. The responding party buttresses its argument by reference to both Rule 25.1 and the Form A-74 (Declaration Verifying Membership Evidence, Construction Industry) which, it contends, also contemplate the union filing membership evidence on behalf of only the persons it believes are employees in the bargaining unit.

13. Sections 7(12) and 7(13) of the Act provide:

> (12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit.
>
> (13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer.

The responding party submits those sections expressly stipulate that an application must be accompanied by a list of union members in the bargaining unit and must include an estimate of the number of employees in the bargaining unit. It argues the Act does not envision a union filing more than one list, or providing, in addition to the list of employees it believes are in the bargaining unit, a contingent list of other union members and membership evidence on behalf of persons on that contingent list.

14. Rule 25.1 states:

> 25.1 An application for certification as bargaining agent must also include:
>
> (a) any membership evidence relating to the application;
>
> (b) a list of employees, in alphabetical order, corresponding with the membership evidence filed; and
>
> (c) a declaration verifying the membership evidence (Form A-74).

The first two paragraphs of the Form A-74 state:

> 1. The documents submitted in support of the application represent membership evidence on behalf of [insert number] persons who were employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining on the application date.
>
> 2. There were [insert number] persons who were employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining on the application date.

The responding party points to Rule 25.1 and Form A-74 to argue that a trade union must only file one list of employees who are in the bargaining unit. It argues those provisions do not permit a union to file a list of names of persons who it does not believe are in the bargaining unit or rely on membership evidence in respect of persons who it does not believe are in the bargaining unit. The responding party summarized its argument based on the Act, Rule 25.1 and Form A-74 as follows:

> …the Employer submits the structure of the Act, the Board's rules and Form A-74 lead to the obvious conclusion that a Union cannot file membership evidence on behalf of persons it believes were not employed in the bargaining unit. It is equally apparent that a Union cannot take alternative/contingent positions before

> the Board that are not clearly expressed in the Application, or that contradict the Union's estimate of the number of employees in the bargaining unit as set out in the application.

15. There is nothing in the Act or the Board's Rules that precludes an applicant union from filing an additional list of persons it believes are not employees in the bargaining unit but who were employees of the responding party together with additional membership evidence on behalf of those persons in case the responding party, which is in a better position to know exactly who it employs in the bargaining unit, takes the position that the persons the applicant believed were not doing bargaining unit work on the application date were in fact in the bargaining unit.

16. Both the Act and the application form require a union seeking certification to "estimate" the number of employees in the bargaining unit. In my view, the Act recognizes that a union might well be mistaken about who is employed in the bargaining unit, which is why the Act only requires the union to provide an estimate.

17. The applicant in this case complied with the Act and the Board's Rules because it did, in fact, provide an estimate of the number of employees in the bargaining unit, a list of their names and the corresponding membership evidence. Moreover, as the Board pointed out in its November 19th decision, the applicant was careful to explain in the Form A-74 it filed why it had filed a separate or second list of names and corresponding membership evidence.

18. The responding party appears to apprehend it is entitled to know whether the applicant had filed membership evidence on behalf of more persons than it estimated were in the bargaining unit. As I pointed out earlier, the applicant's estimate of the number of persons it believes are in the bargaining unit should have no bearing on which employees the responding party says are in the bargaining unit. Moreover, in applications proceeding under section 128.1 of the Act, the Board does not disclose the Form A-74 to the responding party (as that disclosure would contain information about how many employees had joined the applicant) until the list of employees in the bargaining unit is settled. See *Pre-Eng Contracting Ltd.*, [2006] OLRB Rep. May/June 407 (June 14, 2006); *Canterbury Contracting Inc.*, unreported, Board File No. 1132-05-R, decision dated August 30, 2005; application for reconsideration dismissed, *Canterbury Contracting Inc.*, [2005] OLRB Rep. Sept./Oct. 756 at 757-58; *Cor Jesu Re-education Centre of Timmins Inc.*, [1992] OLRB Rep. March 298 at 303. The Board's practice with respect to the disclosure of that information was explained in *Cor Jesu Re-education Centre of Timmins Inc., supra* when it wrote:

> …an applicant for certification going into the process knows how many cards it has, and who signed them, but it may not know for certain how many of those cards are "good" - i.e. how many correspond to the names of employees who ultimately will be found to have been employed in the bargaining unit as of the date of the application - until it is able to see and have a determination made on the employer's Schedules. The employer, on the other hand, has the records to furnish it with the best knowledge of who it is that belongs on those Schedules, and thus in the bargaining unit, but it has no knowledge with respect to the level of membership evidence upon which the applicant is relying. That is the basis upon which the parties under both current and historical Board practice have been called upon to address the initial issue of the bargaining-unit description.

The rationale for the Board not disclosing information about how many employees are members of the applicant union until the list is settled was set out succinctly in *Pre-Eng Contracting Ltd.*, *supra* where the Board wrote at paragraph 9:

> …parties wanted to know the "strength" of the applications of the three unions. However, in none of these files has there been a Regional Certification Meeting. Until the issues with respect to the composition of the list have been crystallized, the Board will not release the Form A-74. To do otherwise would be to be to [sic] open the door to changes of position based on the perception of the likely strength of the Union rather than a desire to identify which employees are actually in the appropriate bargaining unit.

Thus, the responding party is not entitled to learn how many employees are members of the applicant prior to the parties or the Board establishing the list of employees who are in the bargaining unit.

19. It is also significant that section 7(13) of the Act makes clear the information filed by an applicant union about its membership evidence and list of members is not to be disclosed to the responding party. See also section 119(1) of the Act which provides, in part:

> The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed….

The Board's approach in not disclosing the Form A-74 in applications proceeding under section 128.1 of the Act until the list of employees is settled is clearly grounded in the policy established by the Act with respect to maintaining the confidentiality of union membership.

20. The responding party contends the Form A-74 filed by the applicant "was deficient and could not be relied upon by the Board. It follows that the application should have been dismissed." The deficiency in the Form A-74 the responding party identified appears to be the applicant's reference to two groups of membership evidence. The applicant specifically set out and explained in its Form A-74 which membership evidence related to the employees it believed were in the bargaining unit and which membership evidence related to persons who were employed by the responding party but who the applicant believed were not in the bargaining unit. As indicated earlier, there is nothing in either the Act or the Rules that precludes the applicant from filing two lists of employees and two groups of membership evidence. Not only was the Form A-74 filed by the applicant not deficient, I am satisfied the applicant exercised care and made full disclosure of the relevant circumstances when it prepared the Form A-74 and executed it.

21. The responding party argues in the alternative the Board should not rely on the membership evidence filed on behalf of the six persons who the applicant believed were not in the bargaining unit but who the responding party included among the employees it claimed were in the bargaining unit. The responding party referred to *Acton Precision Millwrights Ltd.*, [2003] OLRB Rep. Nov./Dec. 981 (Nov. 28, 2003) to argue that the Board should not consider that membership evidence because it only became relevant after the response was filed. In that case, the Board refused the union's request to transfer membership evidence from an earlier certification application because

the request was made well after the application in issue had been filed. The Board, in dismissing the request to transfer the membership evidence, wrote at page 984

> …the Board will not grant the applicant permission to transfer the membership evidence from Board File No. 4217-02-R to 4258-02-R where the request was made after the application date in the latter file.

In this proceeding, the membership evidence in issue was filed, as required by the Act and the Board's Rules, with the application. The Board's decision in *Acton Precision Millwrights Ltd.* is of no assistance to the responding party.

22. The responding party claims the Board denied natural justice when it permitted the applicant to make submissions in the alternative without advising it that the applicant had taken a position in the alternative. The responding party contends it should have known the positions taken by the applicant before it prepared its response or, at the very least, before having engaged in discussions about settling the list of employees.

23. There is, in my view, no merit in the responding party's natural justice submission. As pointed out earlier in this decision, the responding party is required to provide a list of employees who are in the bargaining unit. The responding party has not provided any rationale for claiming it was denied natural justice because it did not know the applicant had filed membership evidence on behalf of six individuals the applicant believed were not in the bargaining unit before it provided the names of the employees it asserted were in the bargaining unit. The responding party does not contend its position on who it said was in the bargaining unit would have been different if it had known the applicant had filed membership evidence on behalf of 18 individuals, six of whom the applicant understood were not in the bargaining unit.

24. The applicant was uncertain as to the number of employees in the bargaining unit. I note in that regard the responding party, in its response, asserted there were either 25 or 31 employees in the bargaining unit on the application date. In my opinion, the responding party's position on who is or is not in the bargaining unit ought not to be affected by the applicant's estimate of how many employees are in the bargaining unit or by the quantum of membership evidence it files with its application unless the responding party is suggesting the veracity of the response filed by the responding party can be influenced by the applicant's estimate or by how much membership evidence it has filed. I did not understand the responding party to be taking that position.

25. The responding party also submitted the manner in which the Board made its decision in this matter raised a reasonable apprehension of bias. It claimed that permitting the applicant to take alternative positions with respect to the number of employees it estimated were in the bargaining unit demonstrated an institutional bias in favour of trade unions.

26. There is also no merit in the apprehension of bias submission. The responding party contends the Board does not have adequate procedural safeguards to prevent trade unions from taking alternative positions with respect to how many employees are in the bargaining unit. As I indicated earlier, there is nothing in the Act or the Board's Rules that precludes an applicant from doing so.

27. In any event, the responding party misapprehends what the applicant did do in this case. The applicant did not take alternative positions with respect to how many employees it estimated

were in the bargaining unit as the responding party suggests. Rather, the applicant asserted there were twelve employees in the bargaining unit. It filed membership evidence on behalf of those twelve employees. It also said that if the responding party sought to include other persons in the bargaining unit, it had filed membership evidence on behalf of six other persons, and provided a list of six names. The applicant did not, in the alternative, estimate there were 18 employees in the bargaining unit. It maintained its position there were twelve employees in the bargaining unit but that if the Board determined or the responding party claimed there were more than twelve employees in the unit, it had filed membership evidence in respect of six other persons and asked the Board to rely on that additional membership evidence if any one or more of those six were ultimately found to be employees in the bargaining unit. After the responding party had filed a list of employees, contending there were either 25 or 31 employees in the bargaining unit, and ultimately settled on a list of 32 individuals it asserted were employees in the bargaining unit on the date the application was filed, the Board compared the membership evidence filed by the applicant with the names of the employees who the responding party claimed were employees in the bargaining unit. When the Board was comparing the membership evidence filed by the applicant with the names of the individuals the responding party asserted were employees in the bargaining unit, the Board was not receiving evidence or submissions from only one party without notice to or in the absence of the other before coming to its determination. Rather, the Board simply undertook the calculation required by section 128.1(4)(b) of the Act to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was filed.

28. I note in that regard the applicant had challenged nine of the 32 employees the responding party claimed were in the bargaining unit. In coming to its determination, the Board assumed the responding party would be successful in resisting all of the applicant's challenges. Given the level of membership support among the 32 employees the responding party asserted were employees in the bargaining unit on the application date there was no need for the Board to proceed with litigation over the applicant's challenges.

29. In the result, the responding party's request for reconsideration on the grounds that the Board could not rely on the membership evidence filed by the applicant on behalf of persons who it believed were not employees in the bargaining unit but who the responding party asserted were employees in the bargaining unit, that the Board denied the responding party natural justice and that there was a reasonable apprehension of bias is dismissed.

1776-04-R; 1778-04-R; 1794-04-R; 1796-04-R; 1797-04-R Greater Essex County District School Board, Applicant v. International Brotherhood of Electrical Workers, Local 773, Responding Party; Greater Essex County District School Board, Applicant v. The International Unions of Bricklayers and Allied Craftsmen, Local 6, Responding Party; Greater Essex County District School Board, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Responding Party; Greater Essex County District School Board, Applicant v. The International Unions of Painters and Allied Trades, Local 1494, Responding Party; Greater Essex County District School Board, Applicant v. Labourers' International Unions of North America, Local 625, Responding Party.

Construction Industry – Non-Construction Employer – The School Board applied for a declaration that it was a non-construction employer – The Board examined the construction work performed by the School Board to answer two questions: (i) was the work done as part of the School Board's activities or the third party's activities, and (ii) if for the benefit of a third party, can one identify any money that the third party paid in exchange for those services – The Board examined some fifteen projects over a three-year period and found that the School Board fell outside the definition of non-construction employer for one project, the Civic Centre – The School Board receives an administrative fee ($30,000) from the Civic Centre for the provision of construction management services – While the School Board shared in this cost proportionally with the three other occupants (Corporation of the County of Essex; Windsor-Essex Catholic District School Board and the Essex Region Conservation Authority), the Board found that the School Board performs work in the construction industry for which it expects, and in fact does receive, compensation from three unrelated persons – Applications dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Leonard Kavanaugh, Suzanne Porter* and *Penny Allen* for the applicant; *Stephen Wahl, Sol Furer, Tim Snaden, Ken Elliott, William Dunn, Mike Gagliano* for the responding parties.

DECISION OF THE BOARD: February 26, 2009

Introduction

1. This is an application brought under section 127.2 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") in which the Greater Essex County District School Board (the "School Board") seeks a declaration that the five responding party trade Unions (the "Unions") no longer represent their respective trades employed by the School Board in the construction industry. The only issue in this case is whether the School Board comes within the definition of a non-construction employer. That definition is found in section 126:

> "non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person.

2. The School Board is, as its name suggests, a public school board as defined by the Education Act with responsibility under the *Education Act* throughout the County of Essex and the City of Windsor. It builds, maintains and operates primary and secondary schools for the purposes prescribed by the *Education Act*. However, as one might expect of a school board in a large urban centre, it has taken its mandate to a large number of related areas. It assists in adult education and re-training, and provincial apprenticeship programs. It houses both non-profit and for-profit daycare centres, where it is able to accommodate them in its schools. It partners with other public bodies to provide space for, or uses the space of, community centres and swimming pools. It rents out gym and pool-time. It also shares offices and building facilities with a number of municipal, police and community groups.

3. Naturally, it is on these activities that the Unions focussed in its search for instances where the School Board might have performed construction work for an unrelated third party for a fee. While the ultimate legal onus is on the School Board to prove its status, that is established fairly

easily by a general description of the nature of the School Board's work. The burden of persuasion then shifts to the Unions to find an instance where the School Board's activities take it out of the scope of that definition. Indeed, the hearing resembled an extremely lengthy examination for discovery of the School Board by the Unions, seeking information from the School Board. Hence, the evidence in the case (and in this decision) deals with each type of work, one by one, that is asserted by the Unions to take the School Board out of the definition of a non-construction employer.

4. The School Board introduced most of its evidence through Penny Allen, the Superintendent of Business, reporting to the Director of Education who is the Chief Executive Officer of the School Board. Through her, the School Board produced, where documents existed, every document sought by the Unions regardless of any arguments that could have been made about relevance. When Ms. Allen, despite her prodigious breadth of detailed knowledge and memory, could not answer a question, she obtained the evidence from one of two other people who report to her. Although the Unions did raise the hearsay issue of such evidence at one point, it was seeking the information that she provided. In the end, no doubt because of the clarity and trustworthiness of Ms. Allen's evidence, no objection was taken to the hearsay nature of any of her evidence. The Unions also called a number of witnesses from the community and indeed from the School Board, who were much briefer.

5. In the end, with one significant exception, I find that none of the areas explored by the Unions constitute activity by the School Board which is construction work for which the School Board expected compensation from an unrelated person. However, that one exception is significant and it is sufficient to deny the School Board the status it seeks to establish and to cause these applications to be dismissed. However, I have set out the rest of the evidence and argument in detail so that the parties can put it into a proper perspective.

Legal Framework

6. The Board's decisions dealing with non-construction employer applications focus on employers who are not engaged in construction as their principal or core business, but who do perform some construction work to facilitate the primary business in which they are engaged. If the School Board engaged in the construction of, for example, a new school building, it would still thereby be an employer in the construction industry. As the Board pointed out in the *Hudson's Bay Company Limited*, [2002] OLRB Rep. May/June 398 (May 28, 2002) (quoted at length at paragraph 8 below), the non-construction employer amendments did not affect the statutory basis for the reasoning behind the Board's long-held view of what constitutes an employer in the construction industry. The amendments did, however, create a defined class of employers engaged in the construction industry, called non-construction employers. To the extent that such an employer does work for its own benefit, or does it for third parties gratuitously, it is not an 'employer" for the purposes of the construction industry provisions of the *Labour Relations Act, 1995*, at least with respect to the certifications process, and it may apply to terminate a union's bargaining rights under section 127.2 of the Act

7. The contested cases before the Board all arise from businesses that, in the course of the operation of their core business, enter into commercial arrangements with unrelated third parties. To the extent that their commercial relations involve construction activities, there is a real question as to whether they meet the definition of a non-construction employer. The cases turn on the meaning to be given to the phrase "an employer who does work in the construction industry for which the

employer expects compensation from an unrelated person". The question that the Board has focussed on in each decision is the extent to which the construction work in which the applicant employer engages can be said to be part of the work the employer/applicant must do as part of its own business, and the construction work that it does for others to facilitate the work of the business of another person.

8. In *Hudson's Bay Company, supra*, the Board dealt with evidence about a retail store that let certain of its space to licensees who sold their wares directly to the public in the Hudson's Bay Department Store. The licensees were found to be unrelated persons. The Board said at paragraphs 51 and 52:

> 51. We are satisfied that when HBC engages contractors who perform work in the space that licensees occupy, HBC is performing construction work not for its own benefit, but for the benefit of unrelated persons. We accept that where HBC supplies nothing more than demising walls, and electrical and plumbing outlets to licensees, HBC is performing that work for its own benefit; it is the minimum it must do to attract a licensee. But when HBC provides finishing work in premises occupied by licensees, which can include fixturing, partitioning and decorating, HBC is performing construction work for the licensee. Similarly, we conclude that when HBC arranges the supply and installation of fixtures on behalf of, for example, a cosmetic manufacturer, HBC is performing construction work for an unrelated person.
>
> 52. The more significant question is whether HBC is being compensated by the licensee or manufacturer when it performs that construction work. We reject the employer's assertion that "compensation" must be interpreted so narrowly as to mean "profit". Put simply, the Legislature did not use the word profit, which has a well-understood meaning. "Compensation" is a large vessel which accommodates a range of concepts including reimbursement, payment, profit recompense (in money or in kind), and reparation. In our view, compensation is sufficiently expansive to include the circumstances described in this case. Where HBC engages contractors who perform work for the benefit of licensees and manufacturers and HBC expects to be reimbursed by the licensee or manufacturer, that reimbursement is "compensation".

9. In *Shell Canada Products*, [2002] OLRB Rep. July/Aug. 729 (Aug. 20, 2002), the responding party Unions focussed their attack on a number of types of construction work in which Shell engaged. Most of it did not amount to construction work for which Shell expected compensation from an unrelated person. For example, at paragraphs 42 and 43, the Board said:

> 42. In all other cases Shell pays for the construction costs associated with a site where another unrelated party carries on business, and that business generates revenue for Shell. I cannot accept the Unions' argument that this is activity which in and of itself means that Shell does not meet the definition of a non-construction employer. RMO Dealers are one example. In this case Shell does indeed pay for the construction of the gas-bar, convenience store and car-wash. It does so ultimately because it wishes to sell its gasoline from that site. The business technique is to enter into a contract with another business to achieve that objective. While the RMO Retailer is clearly not an employee of Shell, its ability to carry on business in any manner independent from Shell is very restricted. More importantly, the cost of construction is simply one of the costs Shell incurs in creating the site in the first place. The RMO Retailer cannot be said to pay for that construction. Whether the cost is ten thousand dollars or ten million dollars, the division of revenues between Shell and the RMO Retailer is exactly the same. It is not possible to identify any

> portion of the payments between the RMO Retailer and Shell which are attributable to construction costs. Indeed, if a new Retailer were to take over a facility years after its initial construction, Shell might well have "recouped" all of its construction costs from its income from the site already.
>
> This is not simply an accounting matter. The definition of "non-construction employer" requires that an applicant demonstrate that it does "no work in the construction industry *for which* the employer expects compensation from an unrelated person". The italicized words must mean, in a grammatical sense, that it is the construction work *for which* the third party is paying. That is, the Third Party directly or indirectly causes the applicant to engage in construction activities, and has undertaken to pay the applicant for doing so. That is not the case with the RMO Dealers. Shell pays for the construction as part of its cost of doing business, just as on some level it pays for exploration and oil extraction and refining costs. It hopes to recover these costs, plus a profit, from its revenues from the sale of fuel and other products. If the revenue does not cover Shell's costs (construction or otherwise), it is Shell that bears the loss. It takes the risk that the cost of construction will not be recovered from revenues. The division of money between the RMO Retailer and Shell from the gross revenues from sales is a reflection of what the market will bear, and compensates the Retailer for its work in running its part of the business. The division is the same regardless of Shell's construction costs (or any other costs). If revenues are less than anticipated, the Retailer will have a lower income than it expects. However, the Retailer bears no risk of loss for any of the construction costs, or indeed any costs associated with the business other than the purchase of food for the convenience store. The RMO Retailer no more *pays for* the construction costs of the gas-bar than the motorist who purchases fuel, although it is from the motorist's payment that everyone's costs are recovered and income earned.

In contrast, Shell performed certain other construction work for which it expected compensation. The decision continues at paragraphs 46 and 47:

> 46. Terminals 9 and 10 are a different matter. In those cases, Shell is engaged in construction work to accommodate a Trading Partner. Shell undertakes the construction costs. It identifies the costs associated with that construction work. It divides the construction costs by the number of years of useable life of the additional facility. It charges the Trading Partner an amount identified as a "capital cost" fee, which represents one year's worth of the cost of construction. The fact that the capital cost fee is separate from the rental or "throughput" fee makes what Shell is doing clear, but in my view, the result would be the same if the parties had negotiated a single annual fee for the Trading Partner. Shell has engaged in construction work to accommodate the business of a Trading Partner and expects to be compensated by the Trading Partner for having done so.
>
> 47. Unlike the other parts of Shell's business, compensation for the cost of this construction activity is fixed. The cost does not represent an investment in Shell's business from which varying levels of income (profitable or otherwise) will be obtained. Shell will receive a fixed level of compensation from the third party Trading Partner for this work, regardless of how much or how little business is carried on through the addition to the Terminal, or how profitable that activity is. It simply performs the construction work, and receives compensation for it, or at least for that portion of it that represents the proportion of the useable life of the facility that the Trading Partner receives.

10. The issue, then, becomes two questions:

(1) Is the construction work part of or necessary for the business of applicant employer or for the business of the unrelated third party, and

(2) Does the applicant employer expect to receive compensation that is in exchange for the construction activity?

11. In *Windsor-Essex Catholic District School Board*, [2002] OLRB Rep. Sept./Oct. 971 (Oct. 17, 2002), the Board dealt with these two issues and concluded:

> 13. I concur with the conclusion of the Board in *Hudson's Bay Company* that the definition of "non-construction employer" is clear and requires no outside aids to interpretation. An employer who performs no work in the construction industry for the benefit of an entity other than itself is, according to the definition, a non-construction employer. I further concur with the Board's conclusions in *Shell Canada Products* to the effect that, in order for an employer to be taken outside of the definition of non-construction employer, it must undertake construction activity at the behest of, and for the benefit of, an unrelated person and expect to be compensated for such activity.
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> ...
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> 16. Thus, in order for "compensation" to exist, there must be the presence of an exchange. In the context of the definition of non-construction employer, the person paying the compensation is doing so for having been provided with construction services. Accordingly, to fall outside of the definition, it is not sufficient for an employer to engage in construction activity and receive funds from an unrelated person rather, an employer must engage in construction activities and be paid by an unrelated person for having done so.

(See also *Greater Essex County District School Board*, [2003] OLRB Rep. Jan./Feb. 74 (Jan. 22, 2003) at paragraphs 11-13.)

12. At the request of the parties, we dealt with evidence and argument about a single aspect of the School Board's operations. In an interim decision, I discussed the issue in terms of construction work performed by the School Board to facilitate, or as part of, the provision of adult education services at the request of the Human Resources Department of Canada. In that decision, I said:

> 23. The difficulty in drawing this apparently simple line arises in cases where the applicant is engaged in construction activities and that construction is related in some way to the commercial relations with third parties. In assessing whether the necessary exchange has taken place by which the third party is obligated to compensate the applicant *for* the construction work, the Board has examined the fundamental nature of the transaction rather than the surface appearance of the contractual documents. To perhaps oversimplify the analysis in the cases examined, the Board has determined in these cases whether the particular construction work is part of the applicant's business or part of the third party's business. The Board has examined whether the construction activity is work necessary for the applicant to carry on its business (including the business of attracting clients or customers) or whether the applicant is doing it so that the third party can carry on its business, generally in conjunction with the applicant.

> …
>
> 25. Counsel for the Unions identified as compensation the Capital Costs line in each of the Agreements with HRDC, and even further, the specific invoice by invoice requests for reimbursement and payments by HRDC made for the $17,160 worth of construction work. Counsel relies on the fact that the budget for this specific work is approved in advance and paid for specifically as the cost is incurred. What is necessary in this case is to determine whether or not the money received from HRDC that covered the cost of the construction work was for the benefit of HRDC or the benefit of the School Board. It is the essential nature of the transaction that is of significance, not the particular form of contract or words used.
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> …
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> 32. The Agreement with HRDC is not an Agreement that, of necessity, contemplates construction activity. It is an Agreement by which the School Board agrees to deliver a program in the terms specified by HRDC. To reduce the Agreement to its most basic terms, it is a contract whereby HRDC agrees to pay money for the delivery of certain services. What HRDC bargains for is set out in great detail in Schedule "A" to the Agreement. The Agreement sets out in general terms what the objective of the program is, and then describes in great detail the proposed activities and timelines of the project and the numbers of clients to be served at each location. There is no reference at all to any construction activity, although the budget provided by the School Board includes a line item for "Capital Costs" that include (among other things) the construction work. However, the expenditure of money for Capital Costs is not undertaken because HRDC wishes the School Board to purchase computers or software or construction work. These are simply part of the costs that the School Board will incur as part of providing the services for which HRDC bargained.
>
> …
>
> 34. Because neither HRDC nor the School Board is a profit-making business, it is more difficult to apply the analysis of those three cases in deciding whose "business" the construction work was in aid of. It cannot be described as a risk in the hands of either party in pursuit of the profits which it seeks. Nonetheless, I conclude that the construction work was work that was performed by the School Board in order to be able to deliver its end of the bargain. HRDC was prepared to fund the program on a "cost recovery" basis. The construction work was simply one of the School Board's costs, not directly related to what HRDC wanted to obtain. …

13. In reviewing the evidence in these applications, I conclude that the proper analysis is to examine the construction work performed by the School Board to answer these two questions: Was the work done as part of the School Board's activities or the third party's activities, and if for the benefit of a third party, can one identify any money that the third party paid in exchange for those services?

General Issues

The School Board's Activities as a Business

14. In the earlier interim decision in these applications, I made the following comments:

> 29. Essentially, the Board drew a distinction in each of these cases between construction work which is part of the employer's business, and which it must do to attract business from other commercial enterprises or retail customers, and those agreements where the alleged non-construction employer is, in fact, entering into a contract, one element of which is the providing of construction services. Applying this analysis to the facts of this case requires a consideration of the context. Shell, HBC and A & P are profit-making enterprises engaged ultimately in a retail trade. The School Board is neither. However, when the Board performs its core function of providing education under the *Education Act*, it is acting under a statutory obligation. When the School Board undertakes the HRDC contract, it is engaged in activity that it is not under a statutory obligation to perform. This is not the only non-obligatory function it performs, but sits beside alternative high schools and Adult and Continuing Education programs. The School Board sees all of these as complementing and supporting its obligatory function of providing education. That is a decision that it is free to make, but could equally decide not to undertake. To that extent, it is operating more like a business.

Counsel for the Unions argued repeatedly that when the source of money was from any party other than the Ministry of Education under the *Education Act*, that must mean that the party is an "unrelated party". It is impossible to enunciate a general rule about these relationships. In one extreme, if the School Board were to build an additional school to house office space for the Ministry of Citizenship and Immigration, which was used for purposes unrelated to education except peripherally, the Ministry of Citizenship would likely be an unrelated party. On the other hand, if the School Board were to, at the insistence of the Ministry of Education, create courses in the area of skilled trades and found it necessary or expedient to use the expertise and knowledge of the Ministry of Training, Colleges and Universities to teach that subject, such a distinction is harder to make. This issue must, if necessary, be decided on a case by case basis.

Does the School Board operate a "Business" in the Construction Industry?

15. The School Board argued that the construction industry provisions of the Act ought not to apply to it at all since it does not operate a "business", being a statutory School Board that is funded by tax money that spends that money on approved education activities as required by the *Education Act*. Briefly, the School Board argued that the Board was mistaken in its interpretation of the Act for the past 45 years, and was wrong in all of its previous decisions on this question involving the School Board. Nothing in the School Board's argument persuaded me to reverse 45 years of Board jurisprudence developed by the Board since *Tops Marina Motor Hotel* [1964] OLRB Rep. Jan. 583 and the *Kapuskasing Board of Education* [1972] OLRB Rep. June 587 . I note only that it is a somewhat inappropriate place for an employer who brings an application under section 126.2 to assert that it lacks the status to do so.

16. The Board dealt with this argument at length in the *Hudson's Bay Company Limited* case, *supra*, as follows:

> 44. As counsel for the Unions highlighted, the amendments implemented by the Legislature in Bill 139 made no change to the definition of "construction industry" and "employer". What has changed as a result of the amendments is the definition of non-construction employer.
>
> 45. In the Board's view what has not been changed is as significant to the analysis as what has changed. The retention of the same definition of "construction industry" and

"employer" confirms the conclusion in the Board's early decisions with respect to the first "non-construction employer" definition. The Board's longstanding jurisprudence had established that in interpreting the phrase "person who operates a business in the construction industry" no distinction is to be made between vendors of construction services and those who effect construction for their own benefit by engaging contractors. That case law was consolidated in *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279; the *City of Toronto* decision (above) offers a pithy explanation of the rationale at paragraph 15:

> The Board has on many occasions considered situations where employers whose principal or common business is not in the construction industry have been affected by an application for certification under the construction provisions of the Act but who have clearly entered the field and performed work which would be commonly be regarded as construction work. In the *Tops Marina Hotel* case *supra*, the Board held that it was not necessary for the construction activity to be the only business activity or the primary business activity of an employer in order for such an employer to operate a business in the construction industry. Similarly in the *Kapuskasing Board of Education* case *supra*, the Board held that while the principal business of an employer may not be in the construction industry, such an employer may also operate a business in the construction industry, whether on a temporary basis or for some period of time, even though the employer does not anticipate it will regularly carry on a business in the construction industry in the future or even carry on one more operation in the construction industry. In these circumstances the Board has held that this was not a reason not to hold that such an employer is carrying on a business in the construction industry. The Board also noted in that case that there is no requirement that in order to operate a business an operator of such business must necessarily carry on such venture with a view to making a profit. In our view, the respondent [City of Toronto] is an employer within the meaning of section 106(c) [now section 126 (1)] of the *Labour Relations Act* because it performs from time to time work which falls within the definition of construction industry in section 1(1)(f).

46. In the first cases to interpret the original "non-construction employer" definition, the Board determined that the *Metropolitan Toronto* case law remained relevant because the Legislature had created the notion of "non-construction employer" and inserted it into the construction industry provisions of the *Labour Relations Act* without amending the definition of "construction industry" or "employer", (other than to provide that "employer" no longer included a "non-construction employer"). In both *Toronto Dominion Bank* [2000] OLRB Rep. November/December 1240 and *Reitmans* (above) the Board concluded the employers operated a business in the construction industry because they effected construction by engaging contractors to perform work for their own benefit.

47. The Legislature made no amendments that would cause the Board to rethink that analysis. The Legislature has not carved a distinction between vendors of construction services and those who effect construction by engaging contractors. Both groups operate businesses in the construction industry. Counsel for the employer conceded that point in his submissions.

48. But there is no doubt that the Legislature intended to draw some distinction between employers who will continue to be covered by the construction industry provisions and those who will not. The first definition of "non-construction employer" required the

> Board to analyze the relationship between the employer's businesses outside the construction industry, and the business in the construction industry operated by the employer, to determine if the construction business engaged in was "...incidental to the person's primary business". The amended definition focuses the Board's attention elsewhere.
>
> 49. First, as both parties agree, an employer can operate a business in the construction industry to an unlimited degree if it is doing work for itself, or for its own benefit, whether by directly hiring employees or engaging subcontractors, and meet the definition of "non-construction employer". But in contrast, as counsel for the employer accepted, if the employer is doing any construction work for an unrelated person from whom it expects compensation, that employer remains an "employer" whose labour relations will continue to be governed by the construction industry provisions of the *Labour Relations Act*.

I adopt this analysis and have nothing to add to it.

The Interim Decision involving work done in connection with the HRDC programme

17. Both counsel urged me to reconsider different parts of this earlier decision. Both counsel made essentially the same arguments that they made the first time, albeit with reference to those portions of the decision that they claim should have been decided otherwise. That is not a proper basis for reconsideration and, in any event, the argument of neither counsel persuaded me that I was wrong. I do not propose to deal further with that evidentiary area.

Construction versus Maintenance

18. At the outset of the hearing, counsel for the School Board took the position that the School Board would not raise an issue as to whether certain work was maintenance or construction work. While the School Board believed that most of the work on which the Unions focused was maintenance, it also acknowledged that some of it was work in the construction industry. There was, therefore, no issue raised at any time in the evidence about the nature of any of the work to which the Unions pointed. The case proceeded on the basis that all of the work discussed was construction work and I have not looked for that issue in any of the evidence that is crucial to this decision.

19. For the purposes of defining the evidence, the parties agreed to restrict their view of the School Board's operations to the period three years before the application was filed and hence, all of the evidence dealt with the period August 1, 2001 to July 31, 2004.

The Essex Centre for Arts, Aquatics and Recreation (The Essex Aquatic Centre)

20. The Essex Aquatic Centre is, as its name implies, an athletic facility that includes a swimming pool and other space for recreational activities. There was a difference between counsel about the ownership of the building. The best evidence is the Agreement between the School Board and the Town of Essex. This Agreement is quite clear. The School Board owns the building and (paragraph 2.3) "nothing... herein shall be interpreted as conveying or proposing to convey any interest to" the Town of Essex.

21. The Agreement between the School Board and the Town of Essex is for 30 years. The first 10 years include the three-year period examined in this case. Paragraph 2.2.1 provides:

> Each party shall have mandatory participation until September 1, 2008, and will be required to make all capital and operating payments required by the Agreement during that time whether they received any benefit from the facility.

After September 1, 2008 the Agreement runs for a further 20 years, with the option to either party to withdraw before September 1, 2028 on certain terms and on one year's notice.

22. The Town appears to play a greater role in the operation of the Centre than the School Board. The Town of Essex maintains the ongoing expenses of the Essex Aquatic Centre as a separate account on its books. Its agreement with the School Board is that each party will provide half of the funds necessary to operate the Centre, including the salary of Cynthia Cakebread, the Director of the Centre, and all the necessary maintenance, repair and construction work done to the Essex Aquatic Centre. The agreement states that the benefit of any improvement to the works or fixtures will inure to the benefit of the School Board.

23. Some of the work described in the evidence was clearly maintenance work. Other work orders refer to work that may have been repair, (and hence construction side of the line). It is not entirely free from doubt. Not every roof that springs a leak or entranceway tile that is cracked requires work that is construction work to repair it and not every bit of painting work is construction. However, given the parties' agreement not to deal with where the line falls, I need say nothing further about this.

24. The decision to undertake such work is made by Ms. Cakebread. She may call the supervisor at the School Board for the name of a contractor to do the work. If she has been referred to a contractor before, she may call that contractor directly. The evidence before me indicates that the School Board generally issues the work order to the contractor to perform the work on the Aquatic Centre, but instructs the contractor to bill the Aquatic Centre, or the Town of Essex. Generally, the School Board relies on its knowledge of the contractor, its expertise and its capacity, as well as utilizing the standard specifications used by the School Board for contracts on its own buildings.

25. The contractor's invoice is sent to the Aquatic Centre or to the Town of Essex. The Town of Essex pays the invoice. On some periodic basis, the Town calculates the entire cost of operating the Centre, including the cost of maintenance and construction services, and bills the School Board for its half share. Presumably, there is some reconciliation of accounts at the end of the year.

26. On one occasion, a contractor, Rick's Mechanical, sent its invoice to the School Board, and because of an erroneous decision by one of the clerical staff dealing with Accounts Payable, the School Board paid that invoice. Much was made of this evidence in argument. The School Board did not seek reimbursement from the Town of Essex because Ms. Allen feared that this might constitute payment for construction work from an unrelated party. The Unions argued that this is what should have happened, and for the School Board to decide not to seek reimbursement was a matter of form over substance. It pointed to this as one occasion when the School Board had requested a contractor to perform work for an unrelated party (i.e. the Town of Essex to the extent of fifty percent of the work) for which it was entitled to compensation (again, to the extent of fifty percent of the cost).

27. I do not accept that argument. Indeed, if the School Board had sent the bill to the Town with an explanation of the error and sought reimbursement, to regard that payment as "compensation"

as defined in section 126(1) would be to elevate form over substance to an absurd degree. In this relationship, it does not matter who actually pays the contractor for the work done. In the end, all costs are shared equally by the two parties. That is the substance of the transaction, not who actually issues a cheque to the contractor. All the rest is mere bookkeeping. A non-construction employer does not become an employer in the construction industry merely because of an error of a clerical employee processing an invoice.

28. The question in this case is whether the School Board is performing construction work and whether it expects compensation for it from the Town. Although the School Board retains ownership of the lands and building, it was originally constructed (according to the Agreement) with capital contributions from both the Town and the School Board and an almost equal amount from public subscription. Both parties have an equal right to use the facilities, and there is an elaborate process in paragraph 6.2.2 (e) designed to ensure "equality of use" and equal "priority times" for both parties.

29. However, the decision to undertake the construction work is made by Ms. Cakebread, an employee of the Town. Both parties must approve all capital expenditures, as set out in Paragraph 4.2.2. The first level is an approved expenditure in the annual budget (although none of this work appears to be the sort that could be anticipated) set by both parties in some formal fashion. During the year, an expenditure of less that $2,500.00 (which appears to be all of the work identified by the Unions) can be made by a "Delegates Committee" (2 members for each party), while expenditures over that amount require more formal approval by School Board and the Town. I heard no evidence at all about a "Delegates Committee" and only that Ms. Cakebread decided when work needed to be done. The School Board retains the right to insist on approving all work, and may be making the decision by inaction rather than a more formal process. This may simply be the fact that three years after the building was completed, there was little capital or construction work to be done, and neither party (except the Town through Ms. Cakebread) needed to turn their minds to it.

30. There is no construction work here that can be said to be performed by the School Board. It contributes to the process by setting the standards and by explicitly or tacitly approving the work. The decision to do the work comes from the Town's employee, Ms. Cakebread. If the School Board chooses to delegate to her the power to undertake work that the School Board might otherwise be required to do, there is nothing to prevent them from doing so. The School Board is entitled to decide not to undertake certain work on its own behalf. Both parties pay for the cost, and both benefit from it in their equal use of the facility. Neither party is really paying the other to do the work, they are sharing equally in the cost of repairs that they both need to have done.

31. The issue arose in *Independent Electricity Market Operator* [2008] OLRB Rep. March/April 210 (March 3, 2008). The relevant facts and analysis are set out at paragraphs 88-93:

> 88. The Unions finally argue that the IESO received "compensation" within the meaning of the definition from unrelated persons in neighbouring jurisdictions when the IESO performed interconnection metering work at the Ontario border for its benefit and for the benefit of its neighbour. The evidence before the Board indicates that the IESO did this type of work in or around 2003 when updating the meters at Chats Falls. The IESO has also entered into an agreement with Hydro-Québec for the maintenance and repair of meters on the Ontario/Quebec border, under which the IESO pays for fixing three meters on its side of the border and Hydro-Québec pays for fixing four meters and any dispute about costs will go to arbitration. The Unions note that it is a mutual advantage to the IESO and to Hydro-Québec to have interconnection meters installed and functioning

> properly along the Ontario/Quebec border and that the IESO is being compensated in kind for the construction work it does through its contractor, Hydro One.
>
> 89. Assuming that the arrangement between the IESO and Hydro One with whom the IESO has contracted to perform the interconnection metering work in issue is properly viewed as a contract for the provision of construction work by the IESO, the question remains as to whether the IESO was "compensated" for this work by an unrelated party, being Hydro-Québec. In determining whether "compensation" exists for the construction activities in issue, there must be the presence of an exchange for having been provided with construction services. The compensation received by an employer from an unrelated person must be for having engaged in construction activities in order to take the employer outside of the non-construction employer definition (*Windsor-Essex Catholic District School Board*, [2002] OLRB Rep. Sept./Oct. 971). .....
>
> 93. In the present case, there is no evidence of any monies or other forms of remuneration having changed hands between the IESO and any of its neighbours. In the case of the IESO and Hydro-Québec, each is generally responsible for installing, repairing and maintaining interconnecting meters on their respective side of the border. Both further require the data provided by the meters to perform their respective functions. As such, any construction work associated with the interconnection meters is performed for their mutual benefit. The arrangement reached between them is that each bears the cost and responsibility for the meters located on their respective sides of the border.

32. In this case, the question is whether, in paying for 50% of the construction work at the Essex Aquatic Centre each, the Town of Essex and the School Board are "paying for their own construction" or whether one is paying compensation to the other for construction work. I conclude on the facts before me, and having regard to the type and nature of the work performed, that this situation is similar to that described in the *Independent Electricity Market Operator* case quoted above, that is that each party is paying for its own construction work. Accordingly, I conclude that the arrangement between the Town of Essex and the School Board was not, in substance, an agreement by which the School Board performed construction work for which it expected compensation from the Town of Essex.

Marlborough Community Centre

33. The Marlborough Community Centre is a small building that situated beside a public school of the same name. Pursuant to a lease agreement, the City let the premises to the School Board for junior kindergarten and senior kindergarten. In exchange, the School Board agreed to accept responsibility for all expenses associated with the Marlborough Community Centre: custodial services, all leasehold improvements, all maintenance and operational costs and any repairs and renovations. Ultimately, the School Board used all of the space in the Marlborough Community Centre. In fact, it did perform a significant amount of repair, the retrofit of boilers, painting and washroom construction work, and construction work related to the electrical system and to certain doors.

34. The rent paid to the City was one dollar per year. The lease contains the following provision at paragraph 1(k):

> The City shall be responsible for any and all capital improvements which shall be carried out at the sole discretion of the City, which discretion shall be exercised in a commercially reasonable manner.

The Unions argued that some portion of the work done were capital improvements, along with the other repairs or retrofit work. It argued that to the extent the School Board did them, it was entitled to be reimbursed by the City. The fact that it chose to forego any charges for that work is, in the Unions' view, the "compensation" for construction work undertaken by the School Board for the unrelated party, the City. I disagree.

35. The lease contains the following provisions:

> 13.
>
> a. The Parties hereto agree that they will commission a Joint Facility Inspection Report with respect to the Centre's building envelope, the cost of which shall be shared equally between the Parties and which report is attached hereto as Appendix "A".
>
> b. The Parties further agree that the contents of Appendix "A" shall form the basis for all future decisions regarding the responsibility for costs for repairs to structural and/or building envelope related materials/items.

What the parties agreed to be "repairs and renovation" (paragraph 11, the School Board's responsibility), and what is "capital costs" (the City's responsibility) was never identified in evidence. The terms obviously overlap and the nature of the work does not define which category it falls into. Clearly, none of it covers "structural" work as that term appears to be used in paragraph 13 of the lease. The School Board was of the view, rightly or wrongly, that they had to do whatever they wanted done to the building. Ms. Allen testified that the Marlborough Community Centre had been essentially abandoned by the City and that it was unwilling to put money into it. Given the terms of the lease, including paragraph 13, it seems to me self-evident that the School Board could not go ahead and perform work without consulting the City and then demand that the City pay for it. As counsel for the School Board put it, whatever the School Board wanted, it had to do it and pay for it itself.

36. The work of the Marlborough Community Centre does not take the School Board out of the definition of a non-construction employer.

Begley Community Centre

37. The Begley Community Centre was attached to a school by the same name. Both buildings were in a poor state. They were both demolished in 2004 and a new school built on the same land.

38. Before the demolition, the City owned the Begley Community Centre. It did not use it. The School used the premises for additional space. Pursuant to an agreement, the School Board did such work on the premises as it deemed necessary. The evidence includes three work orders: "Repair tile floor that is lifting in the kitchen area"; "Repair damaged ceiling tiles in the East work room"; and the "re-keying of a door". This work was performed by employees of the School Board. There is no suggestion that the work was done under the provisions of the Provincial Collective Agreements

between the Unions and the Employer, nor were the rates in those Provincial Collective Agreements paid to School Board employees who were working and were paid under the Maintenance Collective Agreements between the Unions and the School Board. From this brief description, the work does not appear to be construction work at all. In any event, given the extremely minor nature of the work, i.e. that the expected useful life of the repair would be very short, all of the benefit inured to the School Board as user, not the City as owner.

39. In 2004, the School Board demolished the school. The City decided that it no longer needed the Begley Community Centre and deeded it to the School Board, along with some land in an unopened road allowance, as well as the land on which the Begley Community Centre sat. Consideration for the transfer of land was one dollar. The Unions argued that, by foregoing a demand for the payment of the real value of the land, the City paid for:

(b) the demolition of the school and

(c) the cost of constructing a new sewer to the existing storm sewer on an adjacent street (the sewer work appears to have been done after August 1, 2004, the engineering work preparation was done in 2003).

40. I do not accept that argument. There was no particular obligation on the City to demolish the Begley Community Centre. If it chose to transfer the land, with or without a building on it, that was its choice. Obviously it treated the land as having no value to them or a value that it was prepared to forego by transferring the land to the local School Board. The fact that it knew that the School Board would demolish the building to build, for the School Board's purposes, another school, was irrelevant. The City had no need for the land or the building and no need to demolish it.

41. Similarly, the sewer constitutes work exclusively for the benefit of the School Board. It connected the school to the main sewer lines in the City. To the extent that this represented a new sewer line, and an improvement of municipal sewer lines used by others than the School Board, rather than just hooking up the School Board's sewers to an existing connection, that is the kind of improvement that municipalities impose on owners and developers all the time. I have no evidence to suggest that the work was work that would otherwise have been done by the City for its general municipal benefit. The work was done for the benefit of the School Board only. While they were at it, the City, in typical municipal government fashion, extracted some benefit for the sewer system as a whole.

Roadwork at Coronation Public School

42. This work was a matter of some evidentiary dispute, which is surprising given that the only evidence on it came from the evidence of Ms. Allen. The School Board determined that there was a problem picking up and dropping off students at Coronation Public School. It developed a plan to build a parking lot, pick-up area and bus bay. The original proposal was taken to the City. The City showed some interest. The School Board proposed that the City pay $30,000.00 for part of the work, primarily the bus bay. This amount showed on the School Board's 2003 capital summary in its financial statement. The School Board was sure that the City was going to go along with them on this project, since typically the City would pay for a bus bay.

43. According to Ms. Allen, the City did not. The City decided that the project was more of a parking lot than a bus bay. It hesitated. Finally, the School Board decided that it could no longer tolerate the safety hazard, so it went ahead and built the improvement on its own. In Ms. Allen's words, the City would not come to the table. The City never did participate and paid nothing in the end. Ms. Allen undertook to search the School Board's records to see if any form of payment had been made, and was unable to find anything.

44. In argument, counsel for the Unions suggested that the School Board in this case "expected compensation from an unrelated person", i.e. the City, for this work. Hope is a preferable term to expectation. It hoped that it would persuade the City to share in the cost. It failed in its endeavour to persuade it to do so. It would stretch the words of subsection 126(1) to an unreasonable extent to expect that the ultimately unsuccessful "hopes" of persuading the City to join in on the project is the same as the "expectation of compensation" contemplated by the section. The expectation must be based on a reasonable basis, with some sort of expectation arising from law or custom rather than hopes.

45. This work does not take the School Board beyond the definition of a non-construction employer.

Parks and Recreation Agreement

46. As noted, the School Board rents or uses space at the Marlborough Community Centre. In return, it allocates a custodial office at the Riverside High School to the City of Parks and Recreations Department. In 2002, it paid $126,527 to Lekter Industrial Services for work upgrading the HVAC system at Riverside School. The capital budget for the year refers to it as a heat pump. While the tender itself could not be found, Ms. Allen testified that the two School Board staff in charge of the project identified it as an upgrade to the heating system for the benefit of the entire school building which, of course, included the space leased to the City.

47. In his submissions, counsel for the Unions argued that the City paid no cash for the benefit to the custodial office, but that the School Board received payment in kind in the form of a license to use the space at the Marlborough Community Centre. Counsel then argued that having performed construction work on premises for which it receives no cash rent, the School Board expects compensation for such work in the form of the license to use space at the Marlborough Community Centre. I do not accept that argument.

48. First, the element of an exchange is missing. The School Board did not perform the work in order to obtain its access to the Marlborough Community Centre. The Mutual Access Agreement by which the City and the School Board grant each other access to the properties is not dependent on the performance of that construction work and is enforceable to whatever extent the Agreement is enforceable, regardless of whether the work is done or not. The level of "compensation", both in money and kind, does not change. Hence, if one is to find compensation in the form of access to the Marlborough Community Centre, that compensation is no more payment for the School Board's capital works at the school than the purchase of gasoline at a Shell station is payment for its costs of constructing a refinery.

49. Second, and more important, the $126,527 was not paid to heat the custodial office. It was paid to upgrade the heating system to the entire school. The School Board would have done that

work as part of the construction work it needs to operate and maintain the school. The presence or absence of the custodial office would have made no difference to the work whatsoever. Certainly, there is no evidence that any part of Riverside School is left deliberately unheated, even if such were a practical use of one room in the building. The School Board was not in the position of a commercial landlord who performs construction work in order to rent out premises, or part of them, and derive an income from the rented premises. It is building and maintaining its own schools and incidentally, obtaining space at the Marlborough Community Centre by allowing the City to use the custodial office.

50. This work does not take the School Board out of the definition of a non-construction employer.

Swimming Pools and Gymnasiums

51. Like other school boards, the School Board has gyms and swimming pools for physical education classes. Like many school boards, it rents the space to local municipalities for use in the Parks and Recreation program, or to community groups for use in meetings, scout and guide groups, and other gym and after-school programs. It may charge no rent, nominal rent or a standard commercial rent to such groups. It also does construction work on these facilities: it repairs walls and doors, paints the rooms, repairs pools and associated mechanical systems, replaces flooring and repairs roofs. It pays for this work itself. It does not charge any of the groups renting the school any fee in relation to the construction work. If they pay rent, they do so regardless of any work being done. This work is analytically the same as the custodial office in the Riverside School. There was no element of exchange, the municipality or community groups pay for the use of space, not for the construction work that may be associated with it.

52. More importantly, the School Board performs the work for its own benefit, not because it is interested in rental income. It repairs pools so its own students can swim in them. It re-roofed the gym at Sandwich West School, so that it did not fall in, or allow water to leak in that would damage or destroy interior walls. There is, of course, no evidence that the School Board made a decision to engage in or refrain from construction work because of the level of rental income. The School Board performs works on its buildings because they need them for the "business" of housing and teaching children and adolescents. The decision to make the facilities available to others is a decision most school boards make for reasons of social and community interest. The construction work is irrelevant to the use of those premises by others.

53. This work does not take the School Board out of the definition of a non-construction employer.

Daycares

54. The School Board allows three different groups to use classrooms in a number of schools: one non-profit daycare, Sundowners, and two for profit daycares, Creative Childcare and Discovery Daycare. The relationship, particularly in terms of rent, is different for each of them and accordingly, I will treat each of them separately.

Sundowners Daycare

55. The School Board has charged and wishes to charge only a nominal rent for these premises to Sundowners Daycare. Sundowners is a non-profit operation. The nominal rent charged in the lease does not have any connection between any sort of construction work and the rent paid. The one dollar is essentially payable to ensure a binding lease and serves no other purpose.

56. One year, the School Board Trustees decided to charge a market rent for the space used by Sundowners (it was already in place and operating daycares at many schools). As a result of what Ms. Allen described as a "huge uproar", the Trustees changed that policy and reverted to its former practice of charging only a dollar a year and it refunded any rent that had been paid (or forgave rental arrears). The evidence is limited on this point, but witnesses from Sundowners testified that if Sundowners was forced to pay anything like market rent, the Sundowners Daycare would no longer be financially viable.

57. The Unions argued that this refund was to establish the School Board's position as a non-construction employer. I do not agree. Rent was charged one year, September 2002 to August 2003. Parents lobbied against it. They were successful in doing so. The School Board is, after all, an elected body responsive to political pressure. The School Board refunded any rent collected when they were successful. This is obviously not what one would see in a profit-making business. The decision by the School Board is a decision motivated by social and community beliefs and priorities. I accept Ms. Allen's evidence that the Board concluded that it should not charge rent and chose not to do so, and that the reasons for this decision had nothing to do with the non-construction employer issue. More likely the reasons were for social or political in nature. After all, the School Board does charge rent to the two for-profit daycare centres.

58. Some of the construction work done falls into the same category as the work on the gyms and pools. When the School Board repairs a parking lot, upgrades the HVAC system, replaces a rooftop chiller, repairs sections of the roof of the school, or replaces windows in rooms, including rooms used by the daycares, this is work that the School Board did as a prudent owner of a building that would be used for the purposes of a school. The work was done to extend the life of the building, to preserve its structural integrity and functioning and to improve the efficiency of heating and cooling systems or to replace other systems or facilities that had come to the end of their usable life. The fact that this work also benefited the daycares was irrelevant. The School Board did the work for its own benefit. The presence or absence of the daycare was immaterial to the decision to perform the work.

59. On occasion, when the Board decided to move the daycare from one classroom to another because of its own space needs (which always came first), it would renovate the space that was going to be used or partly used for the daycare in its new location. I do not find that this was construction work for the third party, the daycare, contemplated by section 126. The School Board was simply performing its own renovations as part of the upkeep of its building when the use of a particular space changes. In any event, Sundowners did not pay the School Board for the work.

60. On occasion, the School Board contacted a contractor to work for Sundowners. Like many landlords, it specified what work it wanted done in its building. Sundowners paid the contractor directly, even when the School Board issued the work order to the contractor. That is not the performance of construction work for a third party. It is simply the landlord ensuring that the

work done by a tenant with limited expertise or experience, and where that work is done at the expense of the tenant, met the landlord's standards. It expected no compensation and received none.

61. The School Board generally declined to do work in the space allocated to the daycare. It painted hallways, but did not paint the classrooms used by Sundowners. The decorating of each room was left up to the daycares. However, on some occasions, the School Board did construction (or repair work that is arguably construction) for the exclusive benefit of Sundowners. The great bulk of this work was done by employees of the School Board. Some of the work could be classified as construction work, but the School Board did not charge Sundowners for that work at all. Some of this work was simply normal wear and tear (leaking taps and toilets, door hardware, etc.) for which the tenant is not responsible under the lease. Some of it was arguably construction: painting, affixing a bulletin board to the wall, constructing shelving, rebuilding cupboards and installing mailboxes. The work was very minor in nature and the School Board did not charge for it. The Unions pointed to provisions of the lease, arguing that the Sundowners ought to have paid for that work and that that legal right to compensation under the lease constitutes an expectation of compensation. I disagree.

62. It is not unreasonable for the School Board to read the lease as requiring it to be responsible for many of the work orders to which the Unions point. This Board will not supervise how a party actually enforces its legal rights under a lease or other contract. In a purely commercial profit-making enterprise, such an application of a lease might raise suspicions or cause the Board to examine other types of payments more closely to look for some other form of transaction. In this case, there are no other payments. If the School Board chose to perform construction work without looking to another party for compensation, it can make that decision. The definition in subsection 126(1) refers to an expectation of compensation. If the School Board chooses to do it for free, it is able to do so.

63. Finally, there are certain purchase orders to contractors to which the Unions point as being referable to the Sundowners' space. The School Board issued the purchase orders to the contractor, supervised the work and paid the contractor. It did not charge Sundowners for the work. While the evidence is often unclear as to the extent of the work, many of the purchase orders to which the Unions point are part of a building-wide project. A few are clearly not. Again, if the School Board chooses to do the work for free, it is entitled to do so. If there is no expectation of payment because there is no desire for compensation, that ends the matter.

Sundowners' Office Space

64. Sundowners rents some office space from the School Board at its main administration office on Park Street West in Windsor. The lease requires Sundowners to pay for all repairs to its own demised premises, reasonable wear and tear excepted (Paragraph 4(3)) and all repair to the building caused by its own negligence or fault (Paragraph 4(4)).

65. Some construction work was done for the benefit of the entire building. The HVAC system was upgraded. Nineteen of the windows were replaced, including one that was in the office space used by Sundowners. That work was for the benefit of the whole building. It is similar to the work described above in the schools. The work was undertaken by the School Board as the owner and occupier of its own space. Sundowners may have received some benefit from it, but it did not pay for it. Its rent did not change when the construction work was done. In any event, heating and air

conditioning is the Landlord's responsibility under the lease (Paragraphs 5(4) and (5)) and windows are part of the base building for which the landlord is responsible.

66. Some work was done exclusively in Sundowners' space. In one case the School Board arranged for a contractor and specified the type of paint to be used. Sundowners paid the contractor. Again the School Board acted as a prudent owner and landlord in setting its own standards and the tenant paid for the work. Sundowners did not pay the School Board for construction work; it paid the contractor.

67. The School Board also arranged for a contractor to replace the carpet in the area that included the Sundowners' space. It also paid a contractor to paint an area. The Work Order says: "Main Area of Sundowners, Column South Side of R Room. Peeling paint". It is not clear to me that such work is not the Landlord's responsibility to provide the base building (the lease is silent) or to be responsible for wear and tear. In any event it did not charge Sundowners for the work. Sundowners' rent did not vary with the performance of any such work. The School Board received no compensation and apparently it chose to perform the work gratuitously. That does not take it out of the definition of a non-construction employer.

68. The last work order to which the Unions pointed was the erection of a shelving unit that had been purchased by Sundowners that was fastened to the wall. This work was done at Princess Elizabeth School. It did not charge Sundowners for the work. It did not increase the rent of $1.00 per year. At best the School Board performed the work gratuitously. That fact does not assist the Unions.

Creative Child Daycare

69. Creative Child Daycare is a for-profit daycare, which rents three rooms at General Amherst School for a market level of rent. The Unions alleged that the School Board had performed construction industry work in these three rooms.

70. The first lease in 2001 identifies the space to be used by room name or number. One of them is called "Storage Room 139.5 square feet, renovated facilities and kitchen". Counsel argued that this was a promise to undertake the work of renovating the office and kitchen, for which the lease would otherwise have required Creative Childcare to pay. Aside from that statement found in the lease, there is no evidence that that is what happened. Since the schedule refers to the premises to be used, a recent renovation is as likely as a future one. The entire schedule is descriptive only. I see no reason to infer an undertaking to perform work of that level of complexity, or which would require coordination with a tenant for whom it is prepared, on the basis of a single descriptive term in the schedule to the lease.

71. The Unions refer to work on the roof, the upgrade of heating surfaces, a boiler retrofit and fire alarm retrofit and repairs to the masonry of an exterior door at or near the space used by Creative Child Daycare. None of this is work contributable to the daycare exclusively, although it was located in a portion of the school that was affected by the construction work. Again, this was work the School Board did to preserve and upgrade its own building for its own purposes. It was not done *for* the Daycare, nor did the Daycare pay for it.

72. Finally, the Unions point to a series of work orders issued by the School Board. There is no notation on any of them (with one exception) that the work was done by anyone other than School Board employees, although Ms. Allen referred to at least one which she believed had been performed by Advance Mechanical. Some of these invoices were directed to Board employees. In that case, I conclude the School Board either chose to see it as part of the maintaining of their own plant, or simply chose not to charge for it. Again, there is no connection between the work done and the rent paid. If the School Board decides to do work for free, in the absence of some evidence suggesting that this is simply a subterfuge for the purposes of bringing itself within the non-construction employer definition, it is entitled to do so. Some of the work is not even construction work (e.g. checking for mice).

73. One invoice was issued to Advanced Mechanical to "repair drinking fountain in sink that is leaking". Ms. Allen said she believed it had been performed by that contractor. The School Board did not charge the daycare for it. Frankly, it is questionable whether replacing a leaking component of a functioning system is construction work in any event. Assuming it is, the only cross-examination directed to Ms. Allen about this point was whether or not the School Board paid for it. There was no cross-examination about the School Board's understanding or interpretation of the lease and whether this work fell under the tenant's responsibilities (3.1.2 "to maintain and keep the ... premises … in good order and condition and promptly make all needed repairs and replacements") or whether it is the responsibility of the landlord (3.1.13 "repairs to … utility and service systems"). In the absence of any evidence on the point, I do not believe it is a proper application of subsection 126(1) to examine the overlapping terms in a lease to draw a line where parties did not draw a line or did not feel a need to define where the line is, to decide what the landlord "should have been paid" and to decide that this is compensation it expects, even though it did not. If the issue of whether or not the School Board is a non-construction employer depends on one leaking water fountain, more precise evidence than what I have is necessary.

Discovery Daycare

74. Discovery Daycare is another for-profit daycare that pays more than nominal rent for space in two schools. The work the Unions point to in Kemptville Public School and Jack Miner School is all work of a general nature affecting the entire school: upgrading of a PA system, work in the gym and playground, and so forth. The School Board would have done that work in any event for the benefit of the entire building. There is no logical reason to sever the daycare space from that work.

75. The School Board did paint one room used by Discovery Daycare (B8 at Jack Miner School). The School Board did not charge Discovery Daycare for the work. Ms. Allen attributed that to the difference in terms between the first and second leases. I am not sure I would read the leases that way, but I have no doubt that in the Board's view of its rights, it was required to perform the work. That view is not irrational.

76. However, that still leaves the issue of whether the performance of the work for a tenant paying a commercial or more than nominal rent is the same as a commercial landlord who rents out business and receives compensation in the form of rent for commercial space in exchange for, among other things, the construction work it does on a building. Because of the final decision I reach in this case, I do not need to decide it with respect to the painting of one classroom. Otherwise, there is

nothing in the relationship with the Discovery Daycare that takes the School Board out of the definition of a non-construction employer.

Kingston Learning Centre

77. The Kingston Learning Centre provides instruction services for adult education assistant students. It rents space from the School Board at J.L. Forester Secondary School for $2,700 a year. The Unions point to one invoice paid by the School Board for $3,911 to "repair emergency lights". On checking this work, Ms. Allen testified on January 30, 2007 that she had discovered that it involved the purchase and installation of batteries for emergency lighting throughout the building. This is clearly not construction work and is, in any event, part of a school-wide system, the maintenance of which is of value to the school, so that the presence or absence of the Kingston Learning Centre is irrelevant.

Greater Windsor Track and Field Club

78. This group uses a small hut on the field at Sandwich Secondary School that is owned by the School Board. They sell candy and so on to the public during track meets. The profit from that concession stand is split fifty-fifty between the club and the School Board in exchange for the club's use of the hut. In 2004, the School Board resurfaced one lane of the track. The immediate reason was a soon-to-be-held track meet. However, the school uses the track for its own physical education program. There is no connection between the profit from the concession stand and the ongoing repairs needed to upkeep the school gymnasium and physical education facilities. The share of the revenue from a concession stand is compensation for the use of the hut, not the work of refurbishing the track.

Lakeshore Daycare

79. This is a non-profit daycare in a new school, Lakeshore Discovery. It was funded by the Province which required that it be a non-profit daycare and that all its expenses, including construction expenses, be kept separate from the school construction funding. It occupies a building that it built and owns on the Lakeshore Discovery School property.

80. The Unions point to the fact that the architectural drawings were paid for in their entirety by the School Board. Those drawings include the building used by the Daycare. If this is compensation at all, the payment (which appears to be entirely gratuitous) flows from the School Board to the Daycare. The Daycare has control of its own building and it pays no rent aside from one dollar a year to rent the land.

Migration Hall

81. This is a building commemorating the history of the Windsor area. The building was built by a community group (the Migration Hall Community Inc.) on lands of the Kingswell District High School. The building is now owned by the School Board. It repairs and renovates the building with its own funds. It does not receive payment from anyone for the use or operation of the hall. Any construction work it does is therefore for its own benefit and not connected to any compensation or expectation of compensation received from anyone else.

The Windsor Police Department and Montessori Daycare

82. Both of these entities rent space from the School Board, but the evidence ultimately discloses that the School Board does no work in those premises. The City itself performs all work in the Windsor Police Department space, using its own employees. Montessori Daycare did not require the school to perform any work during the three years in question in the space it occupies.

Essex County Civic and Education Centres ("the Civic Centre")

83. This is a building owned by the School Board, the County of Essex, and the Windsor-Essex Catholic District School Board. It is occupied by these three parties and the Essex Region Conservation Authority. The relationship among the four occupiers of the premises is described in an agreement among the parties and summarized in the Civic Centre financial statements as follows:

> (c) Shared Costs of Building Operations
>
> Building operations are administered by the Corporation of the County of Essex (the County) for which the County receives an administration fee. Building maintenance operations are administered by the Greater Essex County District School Board (the Board) for which the Board receives an administration fee. Building operating costs are shared by the owner occupants on the basis of budget expenditure net of both miscellaneous recoveries and tenant space rental revenue and the previous year's surplus or deficit. The recovery of the costs is recorded as cost sharing revenue. The common costs are shared on the basis of floor space utilization as indicated below with the exception of the County administrative fee, which is shared equally by the owner occupants.
>
> Costs based on floor space utilization are allocated as follows:

Corporation of the County of Essex	50.84%
Greater Essex County District School Board	24.75%
Windsor-Essex Catholic District School Board	16.54%
Essex Region Conservation Authority	7.87%
	100.00%

The ownership proportion of the three owners is not in evidence.

84. The "maintenance operations" referred to above include some construction activities. Some of that was of a type carried on for the benefit of the entire building. A stairway modification was performed for health and safety reasons. A "fenestration" contract concerned the replacement of all or almost all of the windows in the building. Repairs and modifications were made to the heating and cooling system, the plumbing and the electrical system that served the entire building. Repairs and resurfacing work on the parking lot and the access drive to the public road similarly was for the benefit of all occupiers of the building.

85. All work by outside contractors, both construction and non-construction, is ordered by way of a purchase order from the Town of Essex and paid by them. The Town then charges that amount to a Civic Centre account, which is ultimately paid by the Civic Centre itself, i.e. the four occupiers. On two occasions, the School Board may have issued the invoice and paid it. If this happened, it was probably an error. The four occupiers contribute to all of the costs associated with

the running and occupation of the building in the percentages specified above. A reserve for capital expenditures is also created by the occupants contributing to the fund in the same proportion.

86. Counsel for the Unions suggested that the fact that Essex County paid all of the contractors' invoices was simply a way of disguising the fact that the School Board was paying for construction that benefited others. I disagree. The result would be the same if the School Board issued all the purchase orders and paid all of the invoices as the County now does. The reality of the transaction is that the School Board is paying for 24.75% of the cost of operating, maintaining and constructing the building, because it occupies 24.75% of the floor space. It is paying for the construction that benefits it, while others share the cost of their portion of the construction in their respective amounts. Even if, as seems likely, the number of windows is not distributed exactly in the same ratio as the allocation of floor space, all occupiers have an interest in the integrity of the structure of the building and seal created by each window. The School Board is essentially engaged in construction for its own benefit, in conjunction with others who are doing the same thing. The mechanics of how the financial transaction is managed are irrelevant.

87. As noted, Mr. Faulkner is an employee of the School Board. The Civic Centre pays an administration fee of $30,000 per year to the School Board for his services, which amounts to somewhat less than half his salary. The Unions argued that this amount exceeds the strict allocation of his time to the Civic Centre and that some conclusion should be drawn from that. I do not accept that argument. Perhaps the School Board drove a hard bargain; perhaps Mr. Faulkner spends more time than he realized at the Civic Centre; perhaps the same services just could not be purchased more cheaply or efficiently on the open market. Unless it can be demonstrated that the price paid for construction services so disproportionate to the value received as to be better explained by an attempt to disguise some other more substantial transaction, the Board will not inquire into the sufficiency of consideration for any contract or service.

88. The process of arranging for and overseeing the work is a different matter. Most of the construction work originates with the capital budget that is approved for the coming year by the Civic Centre Board. The draft capital budget is created by two individuals, Allan Faulkner, Building Supervisor and Operations Supervisor for Facilities Services of the School Board and Robert Maisonville, Director of Corporate Services for the County of Essex. Mr. Faulkner is a professional engineer licensed to practice in the Province of Ontario, although not in private practice or employed as a consulting engineer. They prepare the budget and submit it to the Civic Centre Board for modification and/or approval.

89. The County issues the purchase orders and cheques for the work, but the great bulk of the supervision work of outside contractors is performed by Mr. Faulkner. He prepares the scope of the proposal and consults with the architects or engineers needed if the complexity of the work is such that their services are needed. He tenders the work or obtains a price from contractors, although that work is also done by Mr. Maisonville. He reviews the bids or tenders once they are obtained. He evaluates them for compliance, completeness and accuracy, sometimes with Mr. Maisonville. He oversees the work while it is going on to ensure that it is done in accordance with the tender or purchase order and the specifications forming part of the contract. He ensures that it is done correctly and completely, and ensures that once the work is ready to be paid for, the invoices are submitted to the Civic Centre and payment is processed. He agreed that he assesses the quality of the work performed.

90. The School Board argued that the work he does is not work in the construction industry. While it is true that what Mr. Faulkner does is not the type of work that employees who are the subject of an application for certification may do, his personal status is not the issue here. The question is what the School Board is doing, through the person of its employee. In this case, the School Board is acting as a construction manager for the four parties to the Civic Centre Agreement. It is the kind of work that is often performed by general contractors when the owner -client prefers to deal this way and the general contractor is prepared to accept a fee for service rather than seek to make a profit in its management of subcontractors.

91. Construction management is sufficiently common that three of the collective agreements binding on the School Board that are at stake in these proceedings (the Labourers', Bricklayers' and Painters' Provincial Collective Agreements) deal with it explicitly. Article 2.07 of the Labourers' Provincial Collective Agreement provides:

> 2.07 Without restricting in any way the application of the sub-contracting provision contained in Article 2.05 of this Agreement, an Employer who undertakes a contract with an owner to provide construction management services shall be subject to said Article 2.05 unless:
>
> (i) The owner selects contractor(s) not bound to this Agreement to bid on work covered by this Agreement and solely and directly solicits or obtains bid(s) for such work from such contractor(s) without any involvement or participation by the Employer in the selection of such contractor(s) (except as to the validity of the bids) or the solicitation or obtaining of any bid(s) from any contractor(s) regardless of whether it (they) is (are) bound or otherwise to this Agreement;
>
> (ii) The owner accepts bid(s) from contractor(s) not bound to this Agreement; and
>
> (iii) The owner contracts or sub-contracts directly with contractor(s) not bound to this Agreement without contractual obligation of the Employer for the work of such contractor(s), other than for the negligent acts or omissions of the Employer.

Mr. Faulkner, as an employee of the School Board, is performing work contemplated by Article 2.07 and does not fall within the exceptions set out in paragraphs i to iii. In fact, it would not matter whether the School Board did or did not fall within the exceptions. All that the Article does is to exempt the Employer from the subcontracting provisions of Article 2.05, not the entire Collective Agreement.

92. The fact that this provision is in a collective agreement, or that it is not found in two of the Provincial Collective Agreements at issue in this case, is not determinative. The point is simply that the activity of construction management is activity in the construction industry that is sufficiently common that some unions and employer associations have bargained about it. It is work in the construction industry in which the School Board engages.

93. The administration fee is significant in this regard. In exchange for these services, the School Board receives $30,000 a year from the Civic Centre. To some extent, it is paying itself (since it contributes 24.75% of the budget) and is therefore paying to perform construction work on its own behalf. Its share of the $30,000 amount is roughly $7,425. It spent that amount for construction services for its own account. It also receives $22,575 from the other three occupants of the Civic Centre for the provision of construction management services. The School Board therefore performs

work in the construction industry for which it expects, and in fact does receive, compensation from three unrelated persons, the County of Essex, the Winsor-Essex Catholic District School Board, and the Essex Region Conservation Authority.

Conclusion

94. This conclusion comes to what is perhaps an unexpected result in the context of all of the evidence analyzed in this decision. The Act, however, is clear: a non-construction employer is one who "does no work in the construction industry for which the employer expects compensation from an unrelated person". The parties acknowledged in argument a number of times, and specifically during argument with respect to the adult education work that is the subject of an interim decision, that the performance of any work in the construction industry for which the School Board expects compensation takes it out of the definition. Given the overall scope of the School Board's operations and frankly, in the context of the great number of transactions the parties examined in this case, it is surprising to find that the School Board does engage in construction services for third parties. This is obviously the result of a historical development of cooperative public relationships in Essex County. The School Board inherited that relationship in 1999 on the merger of the two Boards. Nonetheless, it remains a clear case of the performance of work in the construction industry for an unrelated person for whom the School Board expects compensation. It therefore cannot meet the definition of a non-construction employer.

95. For this reason, the applications are dismissed.

1307-07-R; 2112-07-R Communications, Energy and Paperworkers Union of Canada (CEP), Applicant v. **GreenField Ethanol Inc.**, Responding Party; Communications, Energy and Paperworkers Union of Canada, Local 2003, Applicant v. GreenField Ethanol Inc., Responding Party

Certification – Bargaining Unit – Representation Vote – The union applied for certification of the employees in the employer's utilities department – The employer objected to the proposed bargaining unit because it was department-based, but did not propose another bargaining unit and did not provide notice under section 8.1 – The union won the representation vote but the post-vote hearing was adjourned on agreement of the parties when the panel expressed concern about the appropriateness of the bargaining unit – The union filed a second application for certification of the employer's operating engineers – The employer argued that the first application should be dismissed with a bar pursuant to s. 9 because the Board had determined that the bargaining unit was inappropriate – The Board held that applications with fewer than two employees are dismissed under section 9, which requires the Board to have already determined the appropriate bargaining unit – Once section 9 is satisfied, applications can only be dismissed under section 10(2) – The section 10(3) bar only applies to applications dismissed under section 10(2) – The Board held that the first application should not be dismissed at this time: the Board must first determine the appropriate bargaining unit in that application, and must ensure that those employees have the opportunity to vote – Submissions directed

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Melissa Kronick, Danny McBride* and *Melody Gilbord* for the applicant; *Alan Freedman, David Meadows* and *Angelo Ligori* for the responding party.

DECISION OF THE BOARD; January 15, 2009

1. These are two applications for certification. By decision dated October 23, 2007 the Board deferred consideration of the second application, Board File No. 2112-07-R, until the first application had been determined.

2. These matters came on for hearing. At the commencement of the hearing, the Board advised the parties that it had decided, based on the material filed, that the bargaining unit applied for in Board File No. 1307-07-R was not appropriate. Based on that ruling the parties made oral submissions about what the Board ought to do next. This decision determines that issue.

The Facts

3. The facts relevant to the issue presently before the Board are not in dispute. The employer is a manufacturer of, among other things, industrial ethanol fuel. It has approximately 80 employees at its plant in Chatham which is the subject of these applications. The employees are divided into several departments.

4. On July 13, 2007, the union (in its first application) applied to represent all employees in the utilities department in the following bargaining unit:

> all of the employees of Greenfield Ethanol in the City of Chatham employed in the utilities department, save and except Chief Operator and those above the rank of Chief Operator.

5. The employer filed a response to the application for certification. In its response the employer stated that the bargaining unit applied for was not appropriate because it was a department-based bargaining unit. It advised the Board that there were 17 employees in the bargaining unit applied for. Despite its objection to the bargaining unit applied for, the employer did not propose a bargaining unit which it believed was appropriate – it left that part of the Board's response form blank. In addition, the employer did not give the Board notice pursuant to s. 8.1 of the *Labour Relations Act, 1995* (the "Act"). As noted, it appears that there are approximately 80 employees in all of the employer's departments.

6. The Board ordered a representation vote. Because the employer did not propose an alternate bargaining unit, the voting constituency which the Board directed comprised only the unit which the applicant applied for. The union did not object to that voting constituency and the representation vote was held. The ballots were counted and the union won the vote 5 to 2.

7. The matter came on for hearing. The hearing was adjourned on the agreement of the parties after the panel of the Board hearing the matter expressed some concern about whether the unit applied for was appropriate. Following that, the union filed its application in Board File No. 2112-07-R. On this occasion Local 2003 as the applicant, only applied for the employer's operating

engineers. In other words, in the second application what may be a craft local applied for a potential craft bargaining unit of operating engineers.

8. The issue in this case is whether, as the employer argues, the first application must be dismissed in light of the Board's ruling that the bargaining unit applied for was not appropriate and if it must be dismissed whether a bar must be imposed. The union urges the Board not to dismiss the first application. If the first application is not dismissed, presumably the Board would order a vote of employees in the appropriate bargaining unit in the second application. However, the union is not yet requesting that result.

Decision

9. The employer relies on s.10 of the Act in arguing that the Board must dismiss the first application. Section 10 states:

> **10.** (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.
>
> (3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,
>
> (a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and
>
> (b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.
>
> (3.2) Subsection (3) does not apply if the trade union whose application was dismissed is a trade union that the Board is prohibited from certifying under section 15.
>
> (4) For greater certainty, subsection (3) does not apply with respect to a dismissal under paragraph 7 of subsection 8.1(5).

10. There is nothing in s. 10 which compels the Board to dismiss an application for certification where the union applies for an "inappropriate" bargaining unit. However, the employer relies on the fact that s.10(3) states a "bar" is imposed if the Board dismisses the application under "*this section*". It does not say a bar is imposed if the Board dismisses the application under s. 10(2) which is the usual section under which applications for certification are dismissed. The employer argues that this evidences a legislative intent that an application could be dismissed under more than one subsection of section 10, or to be more precise, that the Board can dismiss an application under s.10(1).

11. The employer relies on the Board's decision in *Northam Development Corporation*, [1997] O.L.R.D. No. 2812 (application for reconsideration dismissed in [1997] OLRB Rep. September/October 915). In that case the Board, in its original decision, dismissed an application for certification, because there was only one person in the bargaining unit, and imposed a bar. The requirement that there be more than one employee in the bargaining unit is contained in s. 9(1) of the Act which states:

> **9.** (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

12. In its original decision, the Board, however, did not state under which section of the Act it dismissed the application.

13. In its decision dismissing the request for reconsideration, the Board made it clear that it had dismissed the application under s. 10 of the Act which mandated the imposition of a "bar". The Board stated:

> 7. The applicant argues that the Board is only obliged to impose a "bar" pursuant to section 10(3) of the Act where an application is dismissed pursuant to that section (section 10). A dismissal pursuant to section 10 of the Act can only occur where following a representation vote, the Board determines that 50 per cent or less of the ballots cast were in favour of the trade union. The applicant asserts that as the ballots cast in this application were not counted, the application cannot be considered to have been dismissed pursuant to section 10 of the Act.
>
> 8. The responding parties argue on this point that the application was in fact dismissed pursuant to section 10 of the Act. It is suggested that section 10(1) requires the Board to certify where more than "50 per cent of the ballots cast" are in favour of the trade union where ballots are cast by employees who are in a bargaining unit "that is determined by the Board to be appropriate for collective bargaining". If the Board determines as it has here, that ballots cast are by employees who are not in a bargaining unit appropriate for collective bargaining, then the prerequisite conditions for a certificate to be issued have not been met. This results in a dismissal pursuant to section 10 of the Act and therefore attracts the "bar" in section 10(3).
>
> 9. On this point we would agree with the responding parties. The question that must be answered in section 10 is the following; have more than 50 per cent of

> employees in a bargaining unit determined to be appropriate for collective bargaining, cast ballots in favour of the trade union? If the answer is "no", then the application must be dismissed pursuant to section 10. Accordingly, the provisions of section 10(3) apply and a "bar" of one year is required.
>
> 10. In this case, following the vote but before the single ballot was counted, the Board determined that the one ballot cast was by an employee who was not in a unit appropriate for collective bargaining. Even if the ballot was cast in favour of the trade union, the answer to the question posed in paragraph "9" above would be "no".
>
> 11. The responding parties also argue that even if the application was not dismissed pursuant to section 10 of the Act, the Board should exercise its discretion pursuant to section 111(2)(k) of the Act to impose a "bar" of one year in the circumstances. In support of this, the responding parties suggest that the true wishes of employees have been tested and for that reason a "bar" should be imposed. The applicant takes the position that the true wishes of the employees have not been tested as the single ballot cast remains uncounted.
>
> 12. Whether or not the true wishes of employees have been tested, in our view even if we are wrong in our finding that this application is dismissed pursuant to section 10 of the Act and for that reason the "bar" is mandatory, we would exercise our discretion in these circumstances to impose a "bar" of one year pursuant to section 111(2)(k) of the Act.
>
> 13. Section 7(10) of the Act deals with circumstances where an applicant withdraws an application for certification after a representation vote is taken:
>
>> **7.** ...
>>
>> (10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.
>>
>> ...
>
> 14. Where an applicant withdraws an application in these circumstances, the Board is required to impose a "bar" of one year. This would apply generally whether the ballots were counted or not following the representation vote. In our view, it would be an absurd result if an applicant could avoid a "bar" by having the application dismissed following the vote rather than seeking a withdrawal. In effect, an applicant would be in a better position with a dismissal following a vote as opposed to a withdrawal.
>
> 15. Having regard to the clear language of section 7(10), it would be inappropriate to permit a fresh application for certification from the applicant within a year of the date of application in this case.

14. In my view, the Board's decision in *Northam Development* is likely not correct and I decline to follow it. When an application for certification is dismissed because there are fewer than two employees in the bargaining unit, such a dismissal occurs under s.9, not under s.10. (See, for example, *Bristol Acoustics & Drywall Inc.*, [2005] O.L.R.D. No. 392 (Jan. 7, 2005) and *First Professional Developments Inc.*, [2005] O.L.R.D. No. 4317 (Oct. 24, 2005), where the Board found

no bar applied as the applications in these cases were dismissed under s.9). I note that in the *Northam* case, it appears the union did not argue that the application should be dismissed under s.9. Further, given that the Board exercised its discretion to bar under s. 111(2) (k) the comments are *obiter dicta.*

15. Apart from that, I disagree with the Board's analysis of section 10. In my view, an application can only be dismissed under s.10(2). S.10(1) has nothing to do with dismissals; it directs the Board to certify the union if a union wins a representation vote.

16. Moreover, even if an application can be dismissed under s.10(1), which I doubt, in my view the pre-condition to a consideration of s.10(1) must have been met; that is, at a minimum, the Board must have determined the appropriate bargaining unit as it is required to do under s.9 and conducted a representation vote in that unit. This conclusion arises from the words "in a bargaining unit that is determined by the Board to be appropriate".

17. The employer agrees that had the Board ordered a vote among a broader group of employees in a broader appropriate bargaining unit (for example, an "all employee" bargaining unit) then its argument would not pertain. However, since the Board did not order a broader vote, the union is stuck with the circumstances as they exist now. The argument that the union and employees might be prejudiced by the Board's decision to vote only the utilities department employees - when the employer did not request a different vote - seems perverse. It is also impractical; the Board occasionally votes a smaller group of employees, where a larger bargaining unit is possible, in the interests of saving resources.

18. In my view, the Board should not dismiss the first application at this point. I must first determine the appropriate bargaining unit pursuant to s. 9 of the Act. After determining the appropriate bargaining unit the Board must then ensure that the employees in that unit have an opportunity to vote. In *Sobeys Inc.*, [2002] OLRB Rep. September/October 915 (Oct. 10, 2002) the Board stated:

> 90. What the UFCW is really objecting to is the fact that the CAW could be certified for a bargaining unit which it did not apply for. Although that result may seem to be unfair it is simply an application of the process established by the Act. Under that process the applicant trade union applies for a bargaining unit and if it appears to have the support of 40% or more of the employees in that unit a representation vote is held. Following the vote the Board determines the unit of employees that is appropriate for collective bargaining. If more than 50 % of the employees in that bargaining unit voted in favour of representation by the trade union the Board certifies the trade union under section 10 of the Act. Nowhere, other than in section 8.1 of the Act, is there any scope for the Board to dismiss an application for certification because the "appropriate" bargaining unit is different from that applied for. Indeed, trade unions are certified to represent different bargaining units that they applied for on a regular basis. One example was referred to by the parties, Morrow Transport. It is also not unheard of for the Board to conduct a representation vote at two plants when the union only applied for one because the employer asserts that two plants together constitute the appropriate bargaining unit. On a more basic level, an employer may seek to include in an appropriate bargaining unit small groups of employees who the union did not apply to represent (eg. Office and clerical employees). If the Board finds that the employer's characterization of the appropriate bargaining unit is correct those employees votes will be counted and they will be included in any certificate which is issued.

19. Similarly, in *City of Toronto*, [1996] OLRB Rep. July/August 552 the Board stated:

> 93. Section 7(12) requires an applicant union to provide two specific pieces of information: a written description of the *proposed* bargaining unit; and an *estimate* of the number of individuals in that unit. The statute recognizes that the unit that the union "proposes" may not ultimately be found to be appropriate, and further, that the union may not know the precise number of employees in the unit. At this stage, though, all that is necessary is a "proposed" unit and an "estimate" of the number of individuals in it. This must be accompanied by a list of union members and evidence of their status as such – for example, signed membership cards of the kind that were filed in this case (see new section 7(13)).
>
> 140. This is not to say that an employer's position on bargaining unit issues is irrelevant when the board is determining whether a union will be certified. It is not. The Board will still have to sort out the bargaining unit description if it is in dispute, and finalize the bargaining unit composition (i.e. the number and identity of the employees in the bargaining unit, and thus the eligible voters) before it can give effect to the representation vote under section 10 of the Act. The fact that the Board does not have to "revisit" the threshold appearance does not mean that the Board will not have to ultimately sort out the composition of the bargaining unit. But we do not think that it is necessary at the "vote ordering stage", nor is it legally or practically possible given sections 8(4) and 8(5).

20. For all of the foregoing reasons the Board declines to dismiss the application in Board File No. 1307-07-R. Because of this decision, it is unnecessary to determine whether a bar would apply had the application been dismissed.

21. At the hearing of the matter, the union requested that the Board not, in this decision, direct a representation vote of the all employee bargaining unit, but instead give it an opportunity to consider its options. Accordingly, the Board directs the union to file submissions on what it proposes the Board shall do next. Such submissions are due within five (5) business days of the date of this decision. Employer submissions are due five (5) days after the union's submissions are filed.

0409-07-ES; 0410-07-ES David Halpin, Applicant v. Mari-Sophia Encarnacion and the Director of Employment Standards, Responding Parties; David Halpin, Applicant v. Ashleigh Leeson and the Director of Employment Standards, Responding Parties

Bias – Employment Standards – Practice and Procedure – The employer applied to review two Orders to Pay, arguing that the responding parties were independent contractors and not employees – On the first day of hearing, the applicant left the proceeding before cross-examining one of the claimants despite a warning from Vice-Chair that he did so at his own peril because the claimant was returning to Bermuda and would not be available for cross-examination at a further date – At the next day of hearing, the applicant requested an adjournment because one of the claimants was in Bermuda and unavailable for cross-examination, and because he had only retained counsel three days before the hearing – The Board denied the adjournment request, reminding the Applicant that he had forfeited his right of cross-examination by leaving the hearing early on the previous date; furthermore, the Board

found that the Applicant had ample time to retain counsel in a more timely way – Once again the Applicant withdrew from the hearing – The Board concluded the hearing in the Applicant's absence – On the merits of the review, the Board held that both responding parties were employees and enjoyed the protections of the *Employment Standards Act* – One day after the hearing, the Applicant sent a written request for the Vice-Chair to recuse herself – The Board held that a recusal was inappropriate because the Applicant had failed to demonstrate a reasonable apprehension of bias; the grounds for the request involved discretionary procedural rulings or lacked a factual basis – The Board held: (1) the Applicant had not requested the exclusion of witnesses until testimony and cross-examination were completed; (2) as parties, each claimant was entitled to remain in the room during the other claimant's testimony; (3) there was no disadvantage to the Applicant arising from how the hearing was conducted; (4) the Applicant could have challenged witness credibility in argument but withdrew from the hearing – Applications dismissed

BEFORE: *Tanja Wacyk*, Vice-Chair.

APPEARANCES: *Charles Gibson* for Dr. David Halpin; *Mari-Sophia Encarnacion* and *Paul Encarnacion* for Ms. Encarnacion and *Ashleigh Leeson* and *Don Leeson* for Ms. Leeson, responding party employees; no one for the Director of Employment Standards.

DECISION OF THE BOARD: January 5, 2009

1. These are two employer applications under section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act"), for the review of an Employment Standards Officer's ("ESO") Orders to Pay Mari-Sophia Encarnacion and Ashleigh Leeson outstanding wages in the form of statutory holiday pay and the accompanying vacation pay, as well as an administration fee pursuant to subsection 103(2).

2. The issue in both applications is whether Ms. Encarnacion and Ms. Leeson were employees, and entitled to the benefits provided under the Act. Ms. Leeson worked as the dental hygienist. Ms. Encarnacion's job duties are in dispute. Dr. Halpin maintained she was an independent contractor performing special project work, while Ms. Encarnacion insisted she worked primarily as a receptionist.

HISTORY:

3. The first day of hearing was August 7, 2008. At the beginning of the day the parties agreed the two applications would be heard together.

4. Dr. Halpin subsequently left the hearing early, despite my caution to him that he did so at his peril, as Ms. Leeson was returning to Bermuda and would not be available to be cross-examined. By decision dated August 14, 2008, I ruled that Dr. Halpin, by leaving the hearing early, had forfeited his right to cross-examine Ms. Leeson.

5. On October 23, 2008, I granted Dr. Halpin's request for an adjournment of the next day of hearing, set for November 19, 2008, on the basis he was scheduled for surgery on that day, and was unable to get the claimants' consent to an adjournment.

6. On November 12, 2008, a notice was sent to the parties advising that the next hearing date was scheduled for December 10, 2008. Subsequently, by correspondence dated November 27, 2008, the parties were advised of a venue change for the December 10, 2008 continuation.

7. Dr. Halpin then requested an adjournment of the December 10, 2008 hearing date, on the basis he had not received the initial notice of November 12, 2008. Rather, he indicated he received only the November 27, 2008 correspondence advising of the change in venue. By decision dated December 5, 2008, I denied the adjournment request, as the Board's records showed the initial notice had been sent to the address provided by Dr. Halpin, and other than Dr. Halpin's assertion he had not received it, there was no indication it had not been delivered.

8. Dr. Halpin attended the hearing on December 10, 2008, with Counsel. Counsel indicated he and Dr. Halpin were surprised Ms. Leeson was not present to be cross-examined. When advised that I had dealt with that issue in my August 14, 2008 decision, ruling he had forfeited his opportunity to cross-examine Ms. Leeson when he left the first day of hearing early, Dr. Halpin indicated he had not received the decision. Following an opportunity to copy and consider the decision, Counsel for Dr. Halpin requested an adjournment.

9. As I understood it, the adjournment was requested for two reasons. The first was in order for me to compel Ms. Leeson to return from Bermuda in order to be cross-examined. The second reason was because Counsel had only been retained on December 7, 2008, and he had not had time to adequately prepare for the continuation. Counsel for Dr. Halpin pointed out that pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "SPPA"), Dr. Halpin was entitled to be represented by counsel.

10. I denied the adjournment on the basis that it would be unreasonable to require Ms. Leeson to attend, as I had cautioned Dr. Halpin that, as Ms. Leeson lived out of the country, if he left the hearing early, he did so at his peril. As Dr. Halpin had chosen to leave, I ruled it would be unreasonable to require that Ms. Leeson return from Bermuda in order to be cross-examined.

11. Nor was I persuaded an adjournment was appropriate on the basis that Counsel had just recently been retained by Dr. Halpin. I pointed out that it should have been clear to Dr. Halpin, when he left the hearing early on August 7, 2008, that he may wish to seek legal counsel, as there were likely to be negative consequences for his having done so. Having waited until December 7, 2008 to do so, I was not persuaded that granting an adjournment on that basis was appropriate, given that Ms. Leeson's father and Ms. Encarnacion were in attendance and ready to proceed.

12. Following my refusal to grant an adjournment, Dr. Halpin, through his Counsel, advised he was withdrawing from the hearing. He indicated this was because my refusal to grant an adjournment was unreasonable, and the hearing process had been unfair to him. Counsel for Dr. Halpin indicated he would consider bringing an application for judicial review. Dr. Halpin and his Counsel then left.

13. This was the second time Dr. Halpin had walked out on the hearing of his own applications, and in my view, it was open to me to find he had abandoned his appeals. However, I proceeded with the completion of the hearing.

14. My decision on the merits in these two applications is set out below.

EVIDENCE:

Dr. Halpin

15. Dr. Halpin is a dental surgeon. At the time at issue, in addition to the two claimants, Carmen Grant, a receptionist, and Lisa Stevens, a dental assistant, worked in his office.

Regarding Ms. Leeson

16. Ms. Leeson worked in Dr. Halpin's office from November 15, 2004 until May 4, 2006. Dr. Halpin described Ms. Leeson's role as providing "clinical therapy", including teeth and gum cleaning, and health promotion by advising patients on oral hygiene.

17. According to Dr. Halpin, in discussing Ms. Leeson joining his office, she indicated to him that she had the instruments needed to perform work as a dental hygienist, and agreed she would be in charge of her own schedule. While Dr. Halpin initially testified that Ms. Leeson used her own tools to perform her services, he subsequently conceded that she may also have used his tools as well. He also conceded that Ms. Leeson performed her work in his offices, and used his sterilization equipment, and dental chair.

18. Dr. Halpin further testified they had also agreed Ms. Leeson would decide how much to bill clients. While Dr. Halpin acknowledged that a fee schedule was in place, he maintained it was "just a guide". He conceded that all the fees charged for Ms. Leeson's services were paid to his practice, and Ms. Leeson received $35 per hour regardless of the fee charged to the clients. He explained that Ms. Leeson's services had to be billed to his practice in order for patients to be reimbursed by their insurance plans.

19. According to Dr. Halpin, Ms. Leeson had indicated she did not want any deductions made from her pay cheques. Rather, and in lieu of deductions, they agreed she would be paid $35 per hour. Dr. Halpin testified this was higher than the norm at the time. When pressed, he testified he based this view on an Ottawa salary survey which indicated the 2007 rate for dental hygienists was $34.50 per hour.

20. Dr. Halpin consulted with his accountant regarding whether Ms. Leeson could be treated as an independent contractor and based on the advice he received, he determined that because Ms. Leeson would not be operating under his supervision, and would not be using any of his tools, she qualified as an independent contractor.

21. In that regard, Dr. Halpin submitted a document dated November 15, 2004, signed by both him and Ms. Leeson which stated as follows:

> This is a contractual agreement made between Ashleigh Leeson and Dr. David Halpin on November 15, 2004. Ashleigh works independently of Dr. Halpin and does not require his supervision when working. Ashleigh is in charge of her own schedule. Ashleigh is not trained by Dr. Halpin. Ashleigh is able to work with her own instrumentation. The rate of pay is $35/hour, which is not subject to deductions.

22. According to Dr. Halpin, the document was drafted by both him and Ms. Leeson, and from his perspective, was to protect him from claims such as this.

23. Dr. Halpin testified that in most two week periods, Ms. Leeson worked 60 hours or more. While she determined her own schedule, she usually worked Monday to Friday, during regular office hours. Dr. Halpin testified that while she could work outside of those hours, as she had her own key, he preferred she perform her duties when he was in the office. This enabled him to see the clients at the same time, as a convenience to them. Indeed, Dr. Halpin did not refer to any occasions outside of office hours on which Ms. Leeson provided her services. Rather, in indicating Ms. Leeson set her own schedule, Dr. Halpin referred only to her determining when patients should return, the length of the appointment to be scheduled, and what amount should be billed for the service.

24. Ms. Leeson did not submit any requisitions or invoice Dr. Halpin for her services. Nor did it appear that any document was exchanged indicating the hours Ms. Leeson had worked. Rather, Dr. Halpin testified that she simply told him the number of hours she had worked, and he paid her accordingly.

25. When asked about the Employment Standards Officer's finding that in addition to her duties as a hygienist, Ms. Leeson had also helped out as a receptionist, Dr. Halpin simply responded that if Ms. Leeson wanted to help out in other capacities "that was great".

26. Ms. Leeson tendered her resignation on April 24, 2006. Dr. Halpin pointed out that her resignation letter made no mention of vacation or statutory holiday pay being owed to her. Rather the letter was positive in tone, indicating she had enjoyed her time at his office, and had learned a great deal. Dr. Halpin denied Ms. Leeson's suggestion, in cross-examination, that she had requested vacation or statutory holiday pay.

Regarding Ms. Encarnacion

27. Ms. Encarnacion worked with Dr. Halpin from July 2005 until March 2006.

28. Ms. Encarnacion was a dentist from the Philippines. According to Dr. Halpin, she desired to work in a dental office, and was prepared to do anything she could to help out.

29. Dr. Halpin denied that Ms. Encarnacion worked as a receptionist in his office. Rather, he maintained Ms. Grant was the only receptionist, and that Ms. Encarnacion was hired to work on "special projects".

30. Dr. Halpin testified that he and Ms. Encarnacion had agreed they would have a "working relationship" and that she would do special projects for him, such as prepare PowerPoint presentations, and assess the profitability of the office. Dr. Halpin testified that they also "discussed that she would be working independently, that is, she would choose her own hours". According to Dr. Halpin, they also agreed that she could work from her computer at home on occasion.

31. According to Dr. Halpin, Ms. Encarnacion requested that no deductions be made from her wages. Dr. Halpin testified that he also advised Ms. Encarnacion she would not receive vacation pay or holiday pay, and it was on that basis they agreed to a pay rate of $20 per hour – which Dr. Halpin contrasted with Ms. Grant's salary of $19 per hour.

32. When asked to describe a special project on which Ms. Encarnacion had worked for him, Dr. Halpin indicated she spent about 30 hours preparing a PowerPoint presentation on lip anaesthesia for a lecture he gave. While he had input into the presentation, Dr. Halpin testified that the technical aspects were within Ms. Encarnacion's expertise as a dentist. Dr. Halpin could not recall whether Ms. Encarnacion purchased the PowerPoint software and billed him, or whether he sent one of his staff to buy it. In any event, it was clear that he bore the cost of the program.

33. Dr. Halpin also testified that Ms. Encarnacion advised him on how to "bill better" which he explained involved using the fee guide to the maximum.

34. Dr. Halpin could not recall any other projects that Ms. Encarnacion completed for him, and maintained that 95% of the hours for which she billed involved the above two projects. In response to Ms. Encarnacion's suggestion, in cross-examination, that she booked, called, and confirmed patients appointments, Dr. Halplin testified that if she did it was not on a regular basis.

35. Dr. Halpin testified that he paid Ms. Encarnacion on the basis of the "little notes" she left him, indicating the number of hours she had worked during that week. He agreed that (as the ESO had found) Ms. Ecarnacion averaged at least 35 hours per week, and some weeks worked more than 40 hours.

36. According to Dr. Halpin, Ms. Encarnacion used both his and her equipment. Specifically, he indicated she used the office pens and computer, as well as her own pens and computer at home. He pointed out that she had her own briefcase.

37. Dr. Halpin testified that Ms. Encarnacion did not work under his supervision. Rather, he maintained she set her own hours, was not trained by anyone in office, and often worked from home.

38. Dr. Halpin made a number of unsubstantiated allegations regarding Ms. Encarnacion's honesty in her dealings with him, and alleged she had caused damage to a computer in his office. As these allegations are not relevant to the issue before me, I have not set them out. Dr. Halpin testified Ms. Encarnacion terminated their relationship when she realized he had become aware of past illegal conduct in which she had allegedly engaged.

39. Dr. Halpin maintained she never questioned why no deductions were made from the monies she earned, or why she was not paid statutory holiday or vacation pay.

Ashleigh Leeson

40. Ms. Leeson denied having freedom to set her own hours. Rather, it was her evidence that she simply scheduled her appointments for when the office was open. She testified that she would arrive at the office at about 8 a.m. and see patients from about 8:30 a.m. until 4 p.m., except on Fridays, when the office closed earlier.

41. Ms. Leeson agreed that Dr. Halpin had agreed to the rate of pay she requested, but denied there had been any discussion of holiday or vacation pay.

42. Ms. Leeson also denied any discussion with Dr. Halpin regarding the use of her own instruments or equipment before she signed the November 15, 2004 document referred to above. She

testified that her understanding, from the language of that document, was that she was agreeing only that she is "able" to use her own instruments, not that she was agreeing to provide her own instruments. She testified that she did not think the issue was important at the time.

43. Ms. Leeson testified that in fact, the instruments she used were provided by Dr. Halpin and that he had them retipped while she was there. She pointed out that in addition to his dental instruments, she used his premises, dental chair, examination light, cabinets, and x-ray machine to perform her work.

44. Ms. Leeson further testified that while she was not directly supervised by Dr. Halpin, he examined the patients after she cleaned their teeth. Further, as a dental hygienist, she required a "standing order" from Dr. Halpin, authorizing her to perform work when he was not in the office.

45. Appointments were booked for Ms. Leeson by the receptionist, using standard time units which conformed with the schedule, unless Ms. Leeson advised that more time was required. Patients were billed for her work by the receptionist, on the basis of the time units required for their appointment. Ms. Leeson maintained that although there is a fee guide, Dr. Halpin had the final say regarding the amount billed. It was her understanding that in most instances, patient charges were consistent with the fee guide.

46. Ms. Leeson testified that for a short time, when the office was understaffed, she performed administrative duties such as opening the office, answering the phone, and picking up messages. This occurred first thing in the morning, from 8:00 a.m. – 8:30 a.m. Ms. Leeson testified that she was paid a lower hourly rate for these duties than she earned as a dental hygienist, although she could not recall the specific rate.

47. In response to my question about what she had observed regarding Ms. Encarnacion's role in the office, Ms. Leeson testified that it was her understanding that Ms. Encarnacion was initially hired as a receptionist to replace Ms. Grant while she was on leave. Ms. Leeson testified that in that capacity Ms. Encarnacion performed the usual receptionist duties, including billing patients, submitting insurance claims, collecting payments and scheduling appointments.

48. Ms. Leeson also agreed with Dr. Halpin's evidence that Ms. Encarnacion worked on some special projects for him, such as creating the PowerPoint presentation referred to in his testimony. However, according to Ms. Leeson, Ms. Encarnacion attended at the office every day, and remained there "all day", performing reception duties in the most part.

Ms. Encarnacion

49. Ms. Encarnacion testified that she began her employment with Dr. Halpin after she responded to an advertisement in the Ottawa Citizen. She did not have a copy of the advertisement with her, but indicated she believed it was for a "dental receptionist" with Dr. Halpin's office.

50. Ms. Encarnacion testified she was interviewed by Dr. Halpin, and it was clear to her that she was being hired as a receptionist. She testified that her duties included: greeting and booking patients, confirming appointments, data entry, billings, sending insurance claims, filing, and other administrative duties.

51. Ms. Encarnacion testified that shortly after she was hired, Ms. Grant, the existing receptionist, left for a two week vacation. However, when she returned, they both continued as receptionists, as there was too much work for one receptionist to manage on her own. According to Ms. Encarnacion, two receptionists are the norm in dental offices.

52. Ms. Encarnacion testified that she started work at the office approximately at 8:00 a.m. Other than Mondays, when she worked until 8:00 p.m., most other days she worked until either 4:30 or 5:00 p.m. Further, Ms. Encarnacion denied performing any work at home. She testified it would have been impossible to do so as she did not have the computer program Dr. Halpin used at his office, which is available only to dentists and for which a license is required. She also testified that as clients did not call her for appointments at home, there would have been no reason to have the program or to perform work at home.

53. Ms. Encarnacion testified that she used only Dr. Halpin's tools and equipment, including: the office computer, telephone, filing system, paper, pens, and markers, as well as her office chair and the office space she occupied.

54. Ms. Encarnacion conceded that she assisted Dr. Halpin with one special project – the presentation regarding lip anaesthesia. She testified she provided no technical support, but rather simply converted the presentation to a PowerPoint format. She testified she spent approximately 20-25 hours on the project. While she came in one Saturday to work on it, she testified that the balance of the time she spent on the project was during her regular office hours.

55. Ms. Encarnacion also pointed out that contrary to Dr. Halpin's evidence's that she was hired specifically for this project, the presentation occurred near the end of the year – whereas she started work at Dr. Halpin's clinic in July 2005.

56. Ms. Encarnacion testified that the primary reason she resigned her employment, which occurred at the end of March 2006, was because, in discussing her T4 with Dr. Halpin, she realized no contributions had been made to any benefit plans on her behalf. She testified she had simply assumed all the usual benefits would be included in her remuneration, and appropriate deductions made, as she had never worked in an environment where that was not the case.

57. Ms. Encarnacion also testified that Dr. Halpin did not provide pay stubs. Rather, he simply provided a copy of her actual pay cheque. She testified she asked Ms. Grant if that was normal, and she indicated it was. Ms. Encarnacion testified that consequently, she assumed Dr. Halpin would set out all the deductions and contributions at the time he issued her T4. However, it became apparent at that time, that no deductions or contributions had been made. Ms. Encarnacion also testified that when she asked about her deductions for income tax purposes, Dr. Halpin responded that she was not an employee and they were hers to take care of.

58. Ms. Encarnacion further testified that she had been planning to get pregnant and needed contributions to be made on her behalf to employment insurance, so she could collect maternity benefits when she needed them. Ms. Encarnacion's resignation letter, dated March 23, 2006, is very complimentary regarding her experience working at Dr. Halpin's practice, but also stated:

> In numerous occasions, including our conversation yesterday, I have expressed my concerns regarding the status of my employment at your office. I mentioned that I need a job that provides the benefits of regular employment.

59. The letter further advises that Ms. Encarnacion has accepted a position at another dental office, and is resigning effective immediately.

ANALYSIS AND DETERMINATION:

60. In his opening statement, Dr. Halpin maintained that dental hygienists such as Ms. Leeson are "duly registered practitioners" under the *Drugless Practitioners Act R.S.O. 1990, Chapter D.1.* and excluded from public holiday pay and vacation pay pursuant to subsection 2(1) of Ontario Regulation O. Reg. 285/01 which states:

> **2.** (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,
>
> …
>
> (c) as a duly registered practitioner under the Drugless Practitioners Act.

However, section 1 of the *Drugless Practitioners Act* provides that:

> "drugless practitioner" means a person who practises the treatment of any ailment, disease, defect or disability of the human body by manipulation, adjustment, manual or electro-therapy or by any similar method.

61. Ms. Leeson indicated that she had never heard of the *Drugless Practitioners Act*, nor been advised that she was governed by the legislation.

62. The definition of "drugless practitioner" makes it evident that subsection 2(1) of Ontario Regulation O. Reg. 285/01 has no application to Ms. Leeson's duties as a dental hygienist, and this issue will not be referred to again.

63. A more useful summary of the "criteria" or "tests" that have been used in the past to determine whether an individual is an employee or an independent contractor is found in the Referee's decision in *858532 Ontario Limited o/a Checker Limousine* (April 7, 1995, ESC 95-73). After setting out the statutory definition of "employee" and "employer", the Referee wrote:

> …
>
> These definitions are expansive and have traditionally been interpreted in that fashion. Much has been written on the definition and I do not intend to cite it all again. Much has also been written about the various tests which should be used to construe the definition. Again, I do not intend to recite all of it. Suffice to say, that there is significant authority validating the use of each of the following three tests: the four-fold test (*Montreal v. Montreal Locomotive Works Ltd.* 11947] 1 D.L.R. 161), the organization test (*Mayer v. J. Conrad Lavigne Ltd.* (1979), 27) O.R.(2d) 129), and the statutory purpose test (*Majestic Maintenance Services Limited,* E.S.C. 479A, February 8, 1977 (Burkett)).
>
> The latter two tests, which have significantly 'enlarged' the four-fold test, have evolved for various reasons. The organization test arose in order to address

> certain perceived rigidities in the application of the criteria of control, ownership of tools, chance of profit, and risk of loss in the face of 'novel situations'. Under the newer test, the two main question asked are: 1) is the alleged employee an integral part of the company's business and organization or merely ancillary to it? and 2) "was his work subject to co-ordinational control as to 'where' and 'when' rather than the 'how'?" *(Stevenson. Jordan & Harrison Ltd. V. MacDonald,* [1952] 1 T.L.R. 101 at 111). [...]

64. The four-fold test is but one of a number of tests that have been developed over the years by the Courts to assist in determining whether or not there exists an employment relationship.[1] The Supreme Court of Canada, in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* [2001] S.C.R. 983 at paragraph 46, pointed out that no one test is necessarily conclusive of the question. What is essential for the inquiry is to determine whether the person performing the services is doing so as a person in business on his own account.

65. In this instance, the four-fold test is of some assistance, and is assessed below.

Ms. Leeson

Control

66. Professional workers such as Ms. Leeson often require little supervision or employer "control" in order to carry out their duties. Consequently, this measure is not as relevant as it might be in instances involving professional or skilled employees. In this instance, it was clear that Ms. Leeson was hired for her professional qualifications as a licensed hygienist, and it would be consistent with those qualifications that she be able to work independently.

67. Although Dr. Halpin indicated Ms. Leeson could schedule work outside of the normal office hours, there was no suggestion this had ever occurred. Rather, Dr. Halpin conceded that he preferred that Ms. Leeson see her patients while he was in the office, as this enabled the patient to see both of them in one visit. Nor was there any suggestion that Ms. Leeson had clients that were separate and distinct from those of Dr. Halpin. I find this factor to be primarily neutral, but slightly weighed toward Ms. Leeson being an employee.

Ownership of Tools

68. While Ms. Leeson's contract provided she could use her own instruments to perform her work, Dr. Halpin conceded that much of the equipment she used was his – i.e. his instruments, his chair, his sterilization equipment – and Ms. Leeson performed all her work in his office – for which there was no suggestion she paid or was charged rent or any sort of fee. Consequently, I find this factor points to an employee/employer relationship.

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[1] These are described briefly in *Re Eiler* [1994] O.E.S.A.D. No. 165 (April 7, 1995) as the four-fold test, the organization test and the statutory purpose test. As the Referee explains, the Act's definitions of "employee" and "employer" have been traditionally interpreted in a broad fashion with the assistance of the aforementioned tests, the latter two of which evolved as a result of "certain perceived rigidities in the application of the criteria of control, ownership of tools, chance of profit, and risk of loss [the criteria applied in the four-fold test] in the face of 'novel situations'." (page 11)

Chance of Profit/Risk of Loss:

69. The evidence showed that Ms. Leeson did not bill her own patients. Even more significant, any profit made on the services she provided was made by Dr. Halpin. Ms. Leeson was paid $35.00 per hour regardless of what the patient was charged. Consequently, the chance of profit and risk of loss was that of Dr. Halpin exclusively, and points strongly to an employee/employer relationship.

70. What is clear from the evidence taken as a whole is that Ms. Leeson brought her dental hygienist skills to the clinic, in exchange for a negotiated wage of $35 per hour. There was no evidence that she engaged in any sort of independent business promotion to secure the clients on whom she performed her services. While she determined the unit of time required to provide a particular service, I am not persuaded she had any control over what rate was charged, other than determining the units required for performing the work. Rather, it appears this was dictated, to a large extent, by the fee schedule, with Dr. Halpin having the final say. In any event, the fee charged made absolutely no difference to Ms. Leeson, as she made the same rate per hour regardless of the fee charged to the patient, which certainly suggests she was not in business on her own account.

71. Based on the above analysis, I find Ms. Leeson was Dr. Halpin's employee rather than in business for herself. That being the case, even if Ms. Leeson agreed that no deductions be made from her pay cheque, and that she would not be paid vacation and statutory holiday (and I make no such finding), section 5 of the Act prohibits parties from contracting out of the minimum standards it mandates. It states:

> **5.** (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

72. It was Ms. Leeson's uncontested submission, in her opening statement, that the Employment Standard Officer's Order contained a mathematical error, in that the Officer had forgotten to add one amount she had found owing – i.e. $219.19. Consequently, I find the total of the Order regarding Ms. Leeson should be increased accordingly.

Ms. Encarnacion

73. I prefer Ms. Encarnacion's evidence, supported by Ms. Leeson, that Ms. Encarnacion's duties were primarily those of a receptionist. It is simply inconceivable that she worked 34 – 40 hours per week for approximately nine months, as conceded by Dr. Halpin, yet all he could recall regarding the "special projects" on which she alleged worked was the presentation regarding lip anaesthesia, and advising him regarding how to use the fee guide to the maximum.

74. Further, I find that in applying the four fold test, all indicia point to Ms. Encarnacion being an employee. Her receptionist duties were performed in Dr. Halpin's office, using his tools, e.g. computer, including the computer program he, as a dentist, was licensed to own and operate, and

other office equipment. As a receptionist, Ms. Encarnacion's work time and duties would have been subject to Dr. Halpin's needs and control, and required Ms. Encarnacion to attend to her duties when the office was open. Finally, there was no evidence on which I can find that Ms. Encarnacion undertook the chance of profit and risk of loss. Rather, those were undertaken by Dr. Halpin exclusively.

75. For all the reasons set out above, I find that Ms. Encarnacion was an employee rather than an independent contractor.

MOTION FOR RECUSAL:

76. On December 12, 2008, I received a written request from Counsel for Dr. Halpin requesting that I recuse myself. As the motion was brought subsequent to Dr. Halpin having withdrawn from the hearing, and the hearing having been completed in his absence, it is arguably too late for him to bring such a motion. I note as well, that neither of the claimants were copied on the motion.

77. However, in order to perhaps avoid any further and unnecessary litigation, I will address the motion.

Issue One:

Submission

78. Counsel for Dr. Halpin submitted that when Dr. Halpin agreed that the two applications would be heard together, he had understood this simply meant they would be heard on the same date.

79. He asserts that despite Dr. Halpin's subsequent request that the claimants not remain in the room when the other testified, I permitted them to "participate in cross-examining one another". Counsel submits this was clearly and patently an unfair way to proceed. He submits it would have been the "normal course" to issue an order excluding witnesses in order to ensure the integrity of the evidence. He submits that my response that the hearings are public was totally irrelevant, and insufficient reason to deny Dr. Halpin's request to have witnesses excluded.

Response

80. Dr. Halpin only raised the issue of the claimants remaining in the room after he had testified and been cross-examined by both claimants. In the normal course, orders excluding witnesses are discussed at the beginning of the hearing, with other procedural issues. In any event, Dr. Halpin did not ask for an order excluding witnesses, but simply protested when Ms. Encarnacion remained during Ms. Leeson's testimony.

81. While I did point out that the hearings are public, I also pointed out that as parties, both claimants were entitled to remain in the room. Further, they did not "cross-examine one another". Rather, as Ms. Encarnacion had indicated it was her intention to call Ms. Leeson as a witness regarding her claim, rather than have Ms. Leeson testify twice, I allowed Ms. Encarnacion to proceed with her questions after Ms. Leeson testified in-chief.

82. When Ms. Encarnacion testified, she did so only regarding her own situation. She made no mention of Ms. Leeson or her circumstance.

83. Given that Ms. Leeson testified prior to hearing Ms. Encarnacion's testimony, and Ms. Encarnacion made no reference to Ms. Leeson in her testimony, it is difficult to see any disadvantage to Dr. Halpin in proceeding in the manner in which we did.

84. Further, even if there had been a request for an exclusion of witnesses, which I had denied, the failure to exclude witness might have been a ground for challenging, in argument, the credibility of either of the claimants' evidence, to the extent it could be argued their evidence was influenced by having heard the other's. However, Dr. Halpin withdrew from the hearing prior to determining whether this would be an issue.

Issue Two:

Submission

85. Counsel for Dr. Halpin also asks that I recuse myself due to my "obvious personal animosity towards Dr. Halpin" which he maintains clearly manifested itself in Counsel's discussions with me. He provides no particulars in making this allegation.

86. However, Counsel for Dr. Halpin subsequently alleged that I "ridiculed" Dr. Halpin in front of the claimants because he was planning to initiate a Small Claims Court action, and submitted this demonstrated my real or apparent bias.

87. Counsel for Dr. Halpin further submits that my comment on the same date that Dr. Halpin's Small Claims Court action would be thrown out in a "nano-second" is once again unacceptable behaviour and shows a real or apprehended bias towards Dr. Halpin and his case.

Response

88. It is unfortunate if Dr. Halpin's Counsel has concluded that I bear personal animosity towards Dr. Halpin. However, in the absence of any particulars, I can respond in no way other than to deny that is the case. I did express frustration to Counsel that a number of the issues raised at the hearing on December 10, 2008 had been dealt with previously, and indicated that I was not prepared to revisit them.

89. Regarding Counsel's submission that I ridiculed his client, again in the absence of particulars, I can only deny doing so. However, when Dr. Halpin made non-particularized allegations regarding one of the claimants, I tried to get him to focus on any actual evidence he had in support of his allegations. He responded by stating the particulars were all contained in his Small Claims Court action, which he presented for my review.

90. Having reviewed the allegations in the Small Claims Court action, it was my view the allegations were equally devoid of specific details, and in pointing that out to Dr. Halpin, I concede I did suggest that in its current form his claim was subject to being dismissed in a nano-second. In doing so, it was not my intent to ridicule him. Rather, I was trying to impress upon him that he

needed to be much more specific and detailed regarding the evidence on which he based his allegations.

Issue Three:

Submission

91. Counsel submits it was clear that when I told him that Dr. Halpin "purported" to have knee surgery scheduled, and therefore required that the prior hearing date be adjourned, that I "didn't even believe him".

Response

92. If I had not believed Dr. Halpin I would have denied the adjournment, or at the very least asked that he provide proof of the pending surgery. I did neither. The point I was attempting to convey to Counsel was that I had taken Dr. Halpin at his word and did not require that he provide evidence of his "purported" surgery – which I suggested was not consistent with any alleged animosity against him. Unfortunately, Counsel seized on my use of the term "purported" as demonstrating the opposite. I might point out that the Cambridge Dictionary of American English defines purported as "claimed but not proved to be true".

Issue Four:

Submission:

93. Counsel for Dr. Halpin reiterated that Dr. Halpin did not receive my August 14, 2008 decision, finding that he had abandoned his right to cross-examine Ms. Leeson.

94. Counsel also submitted that Dr. Halpin takes the position I did not tell him if he left at 4:00 p.m. he would be abandoning his right to cross-examine Ms. Leeson. Rather, he submits that when Dr. Halpin advised me at 2:00 p.m. that he would be leaving, I made no comment at that time.

95. Counsel for Dr. Halpin further submits it was clear from my comments at the hearing that I simply did not want to inconvenience Ms. Leeson by requiring her to return from Bermuda. He argues it should not to be held against Dr. Halpin that Ms. Leeson decided to move to Bermuda.

Response:

96. Even if Dr. Halpin's did not receive a copy of my August 14, 2008 decision, he was given an opportunity to copy and consider it with Counsel when they attended on December 10, 2008. Having done so, they asked me, in effect to reconsider it, which I refused to do.

97. It is not correct that I made no comment when Dr. Halpin announced his intention to leave approximately at 4:00 p.m. Rather, I advised him Board hearings were intended to continue until at least 4:30 p.m., but that if it appeared a hearing could be completed, it was not unusual to continue until 5:00 p.m. or longer. I advised Dr. Halpin that we should press ahead in an attempt to complete as much as we could, and see where we were when he wished to leave.

98. At a few minutes before 4:00 p.m., when it was time for Dr. Halpin to begin his cross-examination of Ms. Leeson, I advised him that in my view, we could finish her cross-examination if we pressed on. Dr. Halpin excused himself and left to make a phone call. When he returned he advised he had to leave. Despite my caution to him not to do so, Dr. Halpin simply left.

99. My refusal to require Ms. Leeson to return from Bermuda to be cross-examined is not, as Counsel suggests, a matter of "inconveniencing" a party. Board hearings are legal proceedings which must be conducted both in a manner that is fair and efficient. The issue is what is fair and reasonable in the circumstances.

100. The Board's resources, as the resources of parties coming before us, are not infinite. It is simply not appropriate, or fair to the other parties, to have one party interrupt the proceedings because that party has other priorities. Had Dr. Halpin requested an adjournment, perhaps he could have persuaded me that an adjournment was appropriate. However, he provided no details regarding why he chose to leave. Further he knew that doing so would make it very difficult, if not impossible, to conclude Ms. Leeson's testimony. In those circumstances, I find it is not fair or reasonable to require Ms. Leeson to return from Bermuda to be cross-examined.

101. I concede I did not tell Dr. Halpin that he was abandoning his right to cross-examination. That is because it appeared open to me to find that by simply walking out of the hearing he had abandoned his appeals, and they were subject to dismissal on that basis. I wanted time to consider the impact of his leaving. I did warn him that if he left it was at his peril.

102. Counsel also repeats his request, made and addressed at the hearing, that I provide "proof of service" on Dr. Halpin, of my decision of August 14, 2008 and the Board's notice of November 12, 2008. Counsel has already been provided with and took copies of these documents and the addresses to which they were sent at the hearing on December 10, 2008. As Counsel is aware, my decision of August 14, 2008 was sent to Dr. Halpin's office, and the November 12, 2008 notice of hearing was sent to the home address he provided to the Board.

Issue Five:

Submission

103. Counsel for Dr. Halpin also relies on my "inexplicable refusal" to admit as evidence a written statement from one of Dr. Halpin's employees on the basis it constitutes hearsay. He argues that "clearly, hearsay is admissible in a proceeding governed by the SPPA and can only be reasonably justified by a real or apparent bias on [my] part" (sic).

Response:

104. I advised Dr. Halpin that I was not prepared to accept the statement unless the employee was made available to testify and be questioned, as it was too prejudicial to the claimant whose situation is addressed in the statement. It was open to Dr. Halpin to either make the employee available to testify, or subpoena her to do so, but he indicated no interest in doing so. Consequently, I refused to accept the written statement on the basis that it is hearsay. This is a ruling that was within my discretion to make.

DISPOSITION OF RECUSAL MOTION:

105. The test for whether it is appropriate for an adjudicator to recuse herself is an objective one. Dr. Halpin must demonstrate only that there is a reasonable apprehension of bias. In other words that a reasonable person, apprised of all the relevant circumstances, would conclude there was an appearance of bias (see for example: *Castle Peak Farm Ltd. v. Knapp*, 2005 CanLII 36945 (ON L.R.B.) (Oct. 17, 2005)).

106. Several of the grounds for the request that I recuse myself involve discretionary procedural rulings with which Dr. Halpin disagrees. In my view, that is not sufficient for a reasonable person to conclude there was an appearance of bias. Further, the balance of Dr. Halpin's submission are based on allegations that have no factual basis.

107. For all the reasons set out above, I am not persuaded it would be appropriate to recuse myself from deciding these matters.

DISPOSITION ON THE MERITS:

108. The applicant's appeal in both files is denied.

109. The Employment Standards Officer's Order regarding Ms. Encarnacion is affirmed.

110. The Employment Standards Officer's Order regarding Ms. Leeson in amended to reflect the $219.19 the Officer failed to include when calculating the total amount owing. Consequently the quantum of outstanding wages to be paid to Ms. Leeson is amended to $5,167.72 and the accompanying administration fee is amended to $516.77, for a total of $5,684.49. Dr. Halpin in directed to pay the full $5,684.49, in trust, to the Director of Employment Standards by no later than 30 days from the date of this decision.

3335-08-HS Kenora District Service Board, Appellant v. Canadian Union of Public Employees, Local 5911 and Steven Briscoe, Inspector, Responding Parties

Health and Safety – Practice and Procedure – Timeliness – On an appeal of an inspector's order under section 61 of the *Occupational Health and Safety Act*, the appellant faxed its materials to the responding parties within the time required by the Rules of Procedure sent its materials to the Board via regular mail – The package was postmarked February 6, 2009 but the time stamp indicated that it was processed by the Board on the morning of February 13, 2009, making the application one day late – The Board does not have discretion to extend the 30 day timeline prescribed by section 61 – Rule 3.4 defines the "date of filing" as the date a document is "received" by the Board – Regular mail delivered to the Board is received by a shared services office that distributes mail to all government agencies located in the same building as the Board – Since the appellant faxed its materials to the responding parties in a timely manner and mailed the package a week before it was received by the Board, it was reasonable to conclude that the package was "received" by the Board on February 12, 2009 and therefore not late – Although the appellant failed to file its materials with the Board within five days of delivering the materials to the responding parties as required by Rule 6.12, Rule 3.2

permits the Board to shorten and lengthen any time in the Rules – Furthermore, Rule 40.7 permits the Board to relieve against the strict application of the rules as it considers advisable – The responding parties were not prejudiced by the late filing – The Board extended the time under Rule 6.12

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; February 17, 2009

1. The appellant seeks to appeal the order made by Inspector Steven Briscoe under section 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 as am. (the "Act") on January 13, 2009 in FV No. 5964107 that requires the appellant to "develop and implement a generic traffic protection plan for emergency situations" (the "Order"). Section 61 of the Act permits an employer adversely affected by an order made by an inspector under the Act to appeal to the Board. Section 61(1) of the Act provides:

> Any employer, constructor, licensee, owner, worker or trade union which considers himself, herself or itself aggrieved by any order made by an inspector under this Act or the regulations may appeal to the Board within 30 days after the making of the order.

2. The appellant prepared the appeal by completing Form A-65 (Appeal of Inspector's Order). The Form A-65 was signed and dated February 3, 2009. According to the Certificate of Delivery filed by the appellant with the Form A-65, the requisite documents prescribed by Rules 7.2 and 22.1 of the Board's Rules of Procedure initiating the appeal were delivered by facsimile transmission to the responding parties at 9:00 a.m. on February 3, 2009.

3. Rule 7.2 requires the party appealing an order of an Inspector to deliver its appeal material to the responding parties before or at the same time the application is filed with the Board. Rule 22.1 of the Board's Rules provide:

> 22.1 An application under section 61(1) of the *OHSA* must be made in writing on Form A-65 and must include all of the information requested on that form, including a copy of the Inspector's Order (Field Visit/Report).

The appellant complied with Rules 7.2 and 22.1 of the Board Rules.

4. The appellant sent its Form A-65 and the other documents required by Rule 22.1 to the Board by regular mail. The envelope in which the documents were enclosed is postmarked February 6, 2009. The envelope and appeal documents were processed by the Board on the morning of February 13, 2009, according to the Board's time stamp appearing on the envelope and Form A-65.

5. Section 61 of the Act establishes that an appeal to the Board of an inspector's order must be done within 30 days after the making of the order. The Order being appealed was made on January 13, 2009. The Board can only consider an appeal of the Order if the appeal was made within 30 days after January 13, 2009, which is February 12, 2009. Therefore, I must determine the day on which the appellant appealed the Order as the Board does not have the discretion under the Act to extend the time prescribed by section 61 for appealing the order of an inspector. See *Lac Des Iles*

Mine Ltd., decision dated August 28, 2006, Board File No. 1589-06-HS, unreported, Q.L. cite [2006] OOHSAD No. 100; reconsideration dismissed, decision dated September 19, 2006, unreported, Q.L. cite [2006] OOHSAD No. 111. The Board in its August 28, 2006 decision wrote at paragraphs 5-7:

> 5. An appeal of an order issued by an inspector under the Act must be filed with the Board within 30 days after the making of the order. There is no provision in the Act that permits the Board to extend the time for appealing from an inspector's order. See Wal-Mart, Board File No. 1806-05-HS, decision dated September 7, 2005, unreported, Q.L. cite [2005] O.O.H.S.A.D. No. 128; National Steel Car Limited, Board File Nos. 2958-00-HS, 2959-00-HS, decision dated January 24, 2001, unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 8; Toronto Catholic District School Board, Board File No. 0179-00-HS, decision dated April 27, 2000, unreported, Q. L. cite [2000] O.O.H.S.A.D. No. 82; National Grocers Cash & Carry, Board File No. 1900-00-HS, decision dated October 4, 2000, unreported, Q.L. cite [2000] O.O.H.S.A.D. No. 168; Ministry of Natural Resources, Board File No. 1895-00-HS, unreported, decision dated September 29, 2000, Q.L. cite [2000] O.O.H.S.A.D. No. 166.
>
> 6. In Cambridge Towel Corporation, Board File No. 0493-01-HS, decision dated May 14, 2001, unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 69, application for reconsideration dismissed, decision dated June 8, 2001, unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 82 the appellant gave a courier the appeal documents on May 8, 2001 for overnight delivery to the Board, before 9 a.m. The last day for filing an appeal of the Inspector's order was May 9, 2001. The courier did not deliver the documents to the Board until the morning of May 10, 2001. The Board, in dismissing the appeal, wrote at paragraph 4:
>
>> It appears that the appellant gave the appeal documents to the courier service on May 8, 2001 with the expectation that those appeal documents would have been delivered to the Board by May 9, 2001. The envelope containing the appeal materials was not actually received by the Board until 8:11 a.m., May 10, 2001. As the appeal in writing was received by the Board on May 10, 2001, that was the day when the appellant made its appeal to the Board. The last day for appealing the Order was May 9, 2001, as the Order had been issued on April 9, 2001. Since the Board does not have the authority or power to relieve against the time limit for appealing an order of an inspector under the Act and as this appeal is untimely because it was made one day late, it must be dismissed.
>
> In the Cambridge Towel Corporation decision dismissing the request for reconsideration, the Board wrote at paragraph 3:
>
>> The Board noted in its May 14 decision that the there is no provision in the Act or the Board's Rules that permits the Board to extend the time for appealing an inspector's order. The Act sets out the time within which an appeal of an order must be made. If the Board had the authority to extend the time for filing an appeal, there is no doubt that the circumstances of this case would warrant the Board granting an extension. The appeal was filed one day late through no fault of the appellant. Although the appellant acted in a timely way by giving the appeal documents to a courier who was to deliver the documents to the Board by 9 a.m. the next day, the courier did not do

> > so. The appellant in its request for reconsideration has not provided the Board with any statutory basis or legal theory on which the Board could rely to extend the time for filing the appeal. The Board held that it does not have the power to extend the time for filing an appeal under the Act when it dismissed the appeal. The appellant has not made any submission that suggests the Board was in error on that point.
>
> 7. The Act does not permit the Board to extend the time within which an aggrieved party may appeal an Inspector's order to the Board.

6. Rule 6.1 of the Board's Rules establishes when an application or appeal is commenced. Rule 6.1 states:

> Every case must be started by completing, delivering and filing the proper application form and filing and delivering any other documents required by these Rules.

The Board's Rules define "file" and "filing" in Rule 1.5(g) as follows:

> "file" means file with the Board, and a "filing" is anything that is filed;

Rules 3.4 and 3.5 establish the date on which a document is filed with the Board by providing:

> 3.4 …the date of filing is the date a document is received by the Board at its office.
>
> 3.5 All filings must be received at the Board's office during normal business hours established by the Board (8:30 a.m. to 5:00 p.m.). A filing received by the Board after the close of business hours will be deemed to be filed on the next day, unless otherwise accepted by the Board or the Registrar.

7. Although the envelope containing the appeal material was processed by the Board on the morning of February 13, 2009, the issue I must determine by virtue of Rule 3.5 is the date on which the material was "received" by the Board.

8. Material delivered to the Board's offices by regular mail is not logged when it is received. Moreover, regular mail delivered to the Board by the Post Office is received by a shared services office that distributes mail to the Board and to other government agencies located in the same building as the Board's offices. In view of the appellant delivering the appeal material by facsimile transmission to the responding parties on February 3, 2009 and as the envelope was mailed to the Board by the appellant on February 6, 2009 as evidenced by the postmark on the envelope, it is reasonable to conclude in these circumstances that the envelope containing the appeal material was delivered by the post office to the Board's premises on the afternoon of February 12, 2009 and was processed by the Registrar's office in the morning of February 13th.

9. In these circumstances, I am satisfied that the appeal was filed with the Board on February 12, 2009 and therefore the appellant appealed the Order within the time prescribed by section 61(1) of the Act.

10. As noted above, the appellant delivered the appeal material to the responding parties on February 3rd and the Board has found the appeal was filed on February 12th. Rules 6.10 to 6.13 deal with the time limits for filing applications after they have been delivered. Rule 6.10 relates to unlawful strike and unlawful lock-out applications, while Rule 6.11 relate to applications for certification, declarations terminating bargaining rights and interim relief. All other applications are subject to Rule 6.12, while Rule 6.13 applies to all applications made to the Board. Rules 6.12 and 6.13 provide:

> 6.12 All other applications must be filed with the Board not later than five (5) days after copies of the application were delivered to the responding party or parties.
>
> 6.13 The Board will not process an application that fails to comply with Rules 6.10 or 6.11 or 6.12 and the matter will be terminated.

The application in this case did not comply with Rule 6.12 as it was filed with the Board more than five days, not including Saturdays, Sundays, holidays and days on which the Board was closed (see Rule 3.1), after it was delivered to the responding parties.

11. Rule 3.2 permits the Board to shorten or lengthen any time period set out in the Rules while Rule 40.7 permits the Board to relieve against the strict application of the Rules "as it considers advisable".

12. The appellant mailed its appeal to the Board within three days of delivering it to the responding parties. The appeal was filed beyond the time prescribed by Rule 6.12 as a result of it being in the mail for a week. The responding parties cannot be prejudiced by the late filing of the appeal with the Board in these circumstances. The Board considers it advisable in all of these circumstances to extend the time under Rule 6.12 to seven days for the filing of this appeal after it was delivered.

13. This appeal is referred to the Registrar for further processing.

14. This panel of the Board is not seized with this matter.

3561-06-R; 3562-06-U United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135, Applicant v. **National Steel Car Limited** and Universal Plasma Cutting Limited, Responding Parties; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135, Applicant v. National Steel Car Limited, Responding Party

Reconsideration – Related Employer – The union sought reconsideration of a Board decision in which it declined to make a related employer declaration that arose in the context of a grievance before a private arbitrator – The union argued that in its original decision, the Board had characterized the underlying grievance as dealing exclusively with the issue of

contracting out, but the Board failed to acknowledge that the grievance also dealt with personnel of the company doing bargaining unit work which resulted in the loss of regularly scheduled working time for bargaining unit employees – The union asserted that, absent a related employer declaration, it would be deprived of the opportunity to make submissions to the arbitrator regarding the loss of work as a potential violation of the collective agreement – Allowing the request for reconsideration, the Board held that where a union makes out the elements for a common employer declaration and demonstrates the mischief that such a declaration was designed to prevent, such a declaration should issue – Original Board decision varied – Related employer declaration made

BEFORE: *Patrick Kelly*, Vice-Chair.

DECISION OF THE BOARD: January 19, 2009

1. By decision dated November 14, 2008, I exercised my discretion to reconsider my earlier decision in this matter dated September 17, 2008 wherein, among other things, I declined in Board File No. 3561-06-R to declare that the responding parties were one employer under subsection 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). This decision determines whether I ought to vary the result in my September 17, 2008 decision pursuant to subsection 114(1) of the Act.

2. Commencing at paragraph 4 of the decision of November 14, 2008, I wrote:

> 4. It may be useful at this point to set out some of the background concerning the exercise of my discretion not to grant a declaration that National Steel Car Limited ("NSCL") and Universal Plasma Cutting Limited ("UPCL") were one employer. Pursuant to the recognition clause in the collective agreement between the applicant and NSCL, the applicant represents employees of NSCL working at a street address in Hamilton. The Hamilton facility includes a Fabrication Department whose bargaining unit employees fabricate parts for use in the manufacture of NSCL's rail cars. NSCL also relies, often heavily, upon third party parts manufacturers, including plasma burning operations, for parts that, for various reasons, the Fabrication Department cannot produce. Throughout the period from 2005 to 2006, NSCL considered setting up a plasma cutting business to supply NSCL with fabricated parts in order to reduce NSCL's reliance upon third party parts manufacturers. NSCL opened up such an enterprise in Kitchener, and commenced operations there in December 2006. Earlier in 2006, NSCL began laying off bargaining unit employees as a result in declining demand for its rail cars. The applicant grieved the layoffs and the grievance went to arbitration, before arbitrator Howard Brown. A question arose in the course of the arbitration hearing as to whether NSCL and UPCL were a common employer, and that question was referred to the Board, resulting in my decision of September 17, 2008.
>
> 5. In the request for reconsideration, the applicant states:
>
> …
>
> The Board came to the conclusion that any layoffs experienced by members of the Union's bargaining unit were due to a decline in orders and not to the establishment of Universal Plasma (UPCL). However, the Board failed to address the fact (admitted by the company witnesses) that employees in the Union's bargaining unit continued to be on lay off while fabrication work was being done at UPCL. At this time, NSCL was not

operating its fabrication unit with the preferred number of shifts. The equipment and manpower were both available to perform this work which, if it had been done at NSCL, would have resulted in the recall of employees. It was the Union's evidence that some of these employees lost recall rights entirely, recall rights that would not have been lost if the fabrication was done at UPCL with the available equipment.

On a different matter, though the Board did refer to Howard Brown's arbitration decision in a grievance filed by the Union under its collective agreement, it characterized the grievance as dealing solely with contracting out. It was noted by Mr. Brown in his decision that there was a further provision in the collective agreement which prohibited personnel of the Company for whom the Union is not recognized as the bargaining agent from performing bargaining unit work.

Article 7.12 (10) reads as follows:

> *The Company agrees that except as otherwise permitted in this agreement, personnel of the Company for whom the Union is not by Article III hereof recognized as the bargaining agent will not perform production work normally done by its employees covered by this agreement, if by doing so, present employees would suffer loss of regularly scheduled working time, except when necessitated by their managerial or other duties.*

The right under article 7.12 (10) is an extremely important right that affects the integrity of the bargaining unit and the livelihood of bargaining unit members. A decision of the Board not to exercise its discretion under section 1(4) of the Act clearly has an adverse impact on the bargaining unit and erodes the union's right to represent employees working at the Kenilworth Avenue North Plant with respect to this provision of the collective agreement.

In his arbitration decision, Mr. Brown decided to defer the question as to whether employees of UPCL are to be considered "personnel of the company" to the Labour Relations Board. The Board has, in effect, curtailed the right of the Union to make its argument in the arbitration regarding Article 7.12 (10) without providing any explanation as to why it considered the exercise of its discretion under Section 1(4) would not have any impact on this important collective agreement right.

The Union maintains that the Board will reconsider where its decision contains an error of fact which is undisputed. In the present case the Board characterized the grievance of the Union as dealing exclusively with the issue of contracting out. It did not understand that the grievance also dealt with personnel of the company doing bargaining unit work which resulted in the loss of regularly scheduled working time for bargaining unit employees. The Board also concluded that the work being done at UPCL only affected employees in the NSC bargaining unit with respect to a possible connection between that work and a layoff of bargaining unit employees, rather than a recall of such employees.

Accordingly, the Union asks the Board to reconsider its decision to decline exercising its discretion under S. 1(4) of the *Labour Relations Act*.

6. I have re-read the Brown arbitration award, as well as my notes of the applicant's final argument. The applicant did in fact in its final argument before me briefly argue the significance of article 7.12(10). Furthermore, the Brown arbitration award itself makes clear that, in addition to the contracting out language in the collective agreement's letter of

> understanding, article 7.12(10) may also be in play in that proceeding, following the Board's determination with respect to this application.
>
> 7. My decision of September 17, 2008 with respect to the Board's discretion under subsection 1(4) of the Act did not take into account the argument of the applicant concerning article 7.12(10). The applicant is not, as counsel for the responding party asserts, simply re-arguing its position. The applicant is asking the Board to consider an argument it made at the hearing in circumstances where my decision fails to acknowledge or deal with it. That is a question of natural justice. In my view, the applicant has provided a valid basis for reconsideration. I therefore exercise my discretion to reconsider my decision in which I declined to grant the subsection 1(4) declaration.
>
> 8. The issue, then, is whether or not the applicant's argument concerning article 7.12(10) ought to result in a different conclusion in this matter. The responding parties are to be given an opportunity to file their submissions on that question, and the applicant will have an opportunity to reply. The written submissions of the responding parties are to be filed and delivered on or before November 28, 2008. The applicant shall have until December 5, 2008 to file and deliver reply submissions.

3. In his submissions, counsel for the responding parties takes the position that the union's request for reconsideration is essentially a request that the Board determine the impact of article 7.12(10) of the collective agreement. Counsel then goes on to argue, based upon a review of a number of arbitration decisions, that article 7.12(10), like other similar clauses interpreted by arbitrators in the arbitral jurisprudence, was intended to reserve bargaining unit work to bargaining unit employees by restricting an employer's right to assign work to non-bargaining unit employees at the work locations covered by the collective agreement. Accordingly, since Universal Plasma Cutting Limited ("UPCL") does not operate at Kenilworth Avenue in Hamilton, and therefore lies outside the scope of the recognition clause in the collective agreement between National Steel Car Limited ("NSCL") and the applicant (or "the union"), article 7.12(10) has no application to the work performed at UPCL's facility in Kitchener. It follows, counsel submits, that a declaration under subsection 1(4) of the Act can have no consequences favourable to the union, nor would such a declaration assist in the arbitration between the parties before Arbitrator Brown. Counsel concludes by stating that I ought not to disturb my decision of September 17, 2008.

4. In his reply submissions, counsel for the applicant submits that it does not fall within the Board's jurisdiction in this matter to interpret and apply article 7.12(10) or the collective agreement generally. Counsel went on to argue that the first question which must be determined in this request for reconsideration is whether or not UPCL and NSCL are associated or related activities or businesses within the meaning of subsection 1(4) of the Act. I did not make any finding related to that disputed issue in my decision of September 17, 2008, although I assumed for the purpose of exercising my discretion not to grant a declaration that NSCL and UPCL were associated or related activities or businesses. In counsel's submission there was ample evidence to make such a finding.

5. Counsel for the applicant goes on next in his submissions to examine the question of the mischief that subsection 1(4) was intended to defeat. He cites a passage from *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 in which the Board stated:

> Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities

> carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. …

6. In this case, counsel for the applicant states that the mischief is the erosion not of representation rights by the union, but rather the erosion of its contractual rights under the collective agreement with NSCL. That is, without a single employer declaration, and in light of the manner in which NSCL has organized the operations of UPCL separate from the operations in Hamilton, the union would be deprived the opportunity at the arbitration before Arbitrator Brown to argue the interpretation and application of article 7.12 (10).

* * *

7. I agree with the position of the union that the submissions of the responding parties in this request for reconsideration are essentially a request to interpret and apply the collective agreement between the parties, and that I have no jurisdiction to do so. That is a matter for an arbitrator, and indeed the meaning and application of article 7.12(10) of the collective agreement has already been identified by Arbitrator Brown as an issue that he may need to decide.

8. In my view, counsel for the applicant is correct that the evidence in this matter leads inevitably to the conclusion that UPCL and NSCL are related or associated businesses or activities within the meaning of subsection 1(4) of the Act. They are not in the *same* business. NSCL's chief business function is to manufacture and sell rail cars. UPCL is in the business of fabricating and selling parts from steel plate. However, the companies are related in the sense that both fabricate parts in much the same fashion, and UPCL has fabricated such parts specifically for use by NSCL in the assembly of rail cars. It is true that, NSCL's importance as a customer of UPCL declined over time, and in fact, it is the case that by May 2, 2008, UPCL had no outstanding orders for parts from NSCL. Based upon the evidence, that is most likely due in part to the fact that demand for rail cars had declined over that period. It does not necessarily mean, however, that UPCL will no longer fabricate rail parts if NSCL experiences a strong surge in demand for its product.

9. There was other evidence to support a finding of relatedness between UPCL and NSCL, including the way in which NSCL has paid for Mr. Soldo's oversight of the UPCL operation, its funding/underwriting of UPCL's operating costs, the creation by NSCL of UPCL's human resource policies and procedures, and the integration of the companies' group insurance coverage: see paragraphs 35 to 39 of my September 17, 2008 decision.

10. The union, therefore, has established all the elements for a single employer declaration. NSCL and UPCL are under common control and direction, and they are related or associated businesses or activities. In my view, the union has also made out an arguable case - not contradicted by anything the responding parties have had to say - that there is a reason to make the declaration under subsection 1(4). That is, without the declaration, the union has no basis upon which to assert the existence of a right under article 7.12(10) of the collective agreement that potentially protects the work of the bargaining unit in Hamilton. In saying that, I am not suggesting that the union will necessarily prevail with respect to any argument it may make concerning article 7.12(10) before

Arbitrator Brown. It may be that NSCL's argument concerning the interpretation and application of article 7.12(10) will be preferred by the arbitrator. However, NSCL ought not to prevail on that issue merely because it has organized its business in a manner that incidentally thwarts the union's opportunity to advance the assertion of a right under the collective agreement. That would constitute an unwarranted frustration of the contractual rights of the bargaining unit members, precisely the type of mischief contemplated in the *Brant Erecting and Hoisting* decision.

11. As the Board noted in *KNK Limited,* [1991] OLRB Rep. Feb. 209 and more recently in *Humphrey Plumbing & Electrical Service Ltd.*, [2006] OLRB Rep. July/Aug. 519 (Aug. 15, 2006), where a trade union has made out the elements for a common employer declaration and established the existence of the mischief for which such a declaration was designed to prevent, the Board will normally issue the declaration in the absence of significant prejudice or a compelling policy reason not to do so.

12. Accordingly, for the reasons articulated above, I hereby vary my decision of September 17, 2008 in which I declined to exercise my discretion in favour of making the declaration sought by the union, and dismissed the application in Board File No. 3561-06-R. I hereby declare that, for the purposes of the Act, National Steel Car Limited and Universal Plasma Cutting Limited are one employer pursuant to subsection 1(4).

1446-08-R; 1447-08-R; 1448-08-U; 1449-08-U Brick and Allied Craft Union of Canada, Applicant v. **Riverstone Masonry Inc.**, Responding Party v. Trevor Lockyer, Derrick Van Den Berg, Nelson Gower, Jamie Rutter, J. Bruce Barclay, JasonVeldman and Mark Kleyn, Intervenors; Labourers' International Union of North America, Local 1059, Applicant v. Riverstone Masonry Inc., Responding Party v. Brandon Rodwell, Justin Vanhevel, Shawn Norrie, Joe Yeoman, Justin McKay, Brady Becker and Joshua DeGraaf, Intervenors; Labourers' International Union of North America, Local 1059, Applicant v. Riverstone Masonry Inc., Responding Party; Brick and Allied Craft Union of Canada, Applicant v. Riverstone Masonry Inc., Responding Party

Certification Where Act Contravened – Construction – Unfair Labour Practice – The Bricklayers and the Labourers both sought automatic certification, alleging that the employer held meetings with its employees and threatened them with job losses in the event the employer was certified – The Board held that equating certification with a loss of employment is a threat to the tenure or security of employment that is inherently coercive and intimidatory – Similarly, subsequent inquiries by the employer regarding contact from the union was part of a process that would lead employees to choose between their employer and continued employment as opposed to the union and unemployment – The Board held that the employer's actions in this case were such that the true wishes of employees could not be ascertained in a second vote – The abrupt end of the organizing campaign, and the content of letters from employees submitted to the Board in response to the unfair labour practice complaints, indicate that the employees made the connection between the union being certified and a loss of their jobs – Applications for certification granted

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Eli Gedalof, Simran Prihar, Brian Pringle, Jesse Shroyer* and *Brandon MacKinnon* for the applicants; *Jonathan Cocker, Siegfried Ramerth* and *Marilou English* for Riverstone Masonry Inc.; *Trevor Lockyer* (on October 17, 2008), *John-Edward Hyde* (on January 19, 2009) and *J. Bruce Barclay* for the intervenors.

DECISION OF THE BOARD: January 26, 2009

1. These four applications consist of two applications for certification by the Brick and Allied Craft Union of Canada ("BACU") and the Labourers' International Union of North America, Local 1059 ("the Labourers"), each seeking to be certified to represent the employees in their craft (bricklayers and construction labourers respectively) of Riverstone Masonry Inc. There are also two complaints alleging that Riverstone Masonry Inc. has violated the Act in a number of ways, seeking declaratory relief with respect to those violations of the Act and specifically, relief under section 11 in the two certification applications. The certification applications were brought pursuant to section 8 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The Union conceded early on that it did not have fifty-five per cent of the employees in the bargaining unit as members and in any event, relied principally on section 11 as the basis for certification. A representation vote was held in both cases and the Union received fewer than fifty per cent of the ballots cast in each case. This decision, then, deals essentially with the request for relief under section 11.

2. Riverstone Masonry Inc. ("Riverstone") is a masonry contractor based in Woodstock, Ontario and active in that local area. Its employees generally do not work beyond a day's travel from Woodstock. On the application date, it employed eight labourers and nine bricklayers (two of whom are alleged to have managerial duties). About 80% of its work is in the residential sector, and the remaining 20% is in commercial work.

3. Riverstone came to the attention of the two Unions, as it began to expand its commercial work and bid successfully against contractors bound to the Unions' ICI Provincial Collective Agreement. They decided to commence an organizing campaign among the employees of Riverstone. The Unions called Brian Pringle, organizer for the BACU, to describe the campaign. He and Jesse Shroyer (for the Labourers) began to solicit membership in both Unions (both organizers had the authority to accept membership applications in both Unions). They began on July 21 through to the application date (August 7, 2008). They believed they were having some success, having collected some cards in July and early August. They believed they were getting a positive response from many other of the employees. The organizing continued on through the August long weekend. By August 5, Mr. Pringle estimated that they had contacted roughly one-third to one-half of the bargaining unit, although from his evidence and the membership applications submitted, it was likely closer to one-half of the bargaining unit.

4. On August 2, 2008 Siegfried Ramerth, President of Riverstone, became aware of the union organizing campaign and decided to speak to his employees. On Tuesday, August 5, the day after the holiday Monday, he met with employees at a job site at Braemer Sideroad near Woodstock, where eight of his employees were working. The meeting took place at about 9:00 a.m. Mr. Ramerth said that this was no different from the regular meetings that he holds when he visits his company's job sites to discuss job progress and plans, and other relevant business. The meeting was held during a break from work, but employees were expected to be present and to be paying attention. What Mr. Ramerth said at that time is not really in dispute, although each witness had some variation on it.

5. Mr. Ramerth said he told the employees that he understood "the union" (whom he believed at the time to be only the Bricklayers Union) was organizing. He said that the choice to join or not was each individual employee's, but if the company "wound up going union" then, because 80% of their contractors would not be able to afford the increase in costs, the company would probably end up losing business over it. In cross-examination, he admitted that he also said that in the end, if the Union was certified business would go down and he would have to lay off employees.

6. The Employer and the intervenors called a number of employees to describe their recollection of this meeting. Those who attended the meeting had slightly different recollections, but all were similar in import. Jason Veldman said that Mr. Ramerth said "if there is any increase in rates, we will not be able to get the jobs" and further "there will be financial problems if you do join as no bricklaying company in Oxford County is unionized". Bruce Barclay remembered him saying "there will be financial problems if you do join" and that in the long term "we would not be viable in our area anymore". Jamie Rutter said that he told employees "a lot of our builders would not be able to afford an increase". Trevor Lockyer remembered that someone, whom he identified in cross-examination as Mr. Ramerth, said that "the company probably wouldn't last three months if it were unionized with the economy the way it is" and that "he couldn't afford to keep us on if we were a unionized company". Mr. Lockyer also said that the three-month time horizon was something that all employees were talking about at that time. Some employees were not at that meeting, but with one exception, they remembered hearing similar kinds of things being said by other employees after the August 5 meeting.

7. During this meeting, the idea of "a letter" surfaced. Some employees said it was an employee who raised it; others such as Trevor Lockyer said it was Mr. Ramerth who raised it. Some could not remember. Everyone agrees that ultimately Mr. Ramerth said that he could not be involved in it, but that employees should feel free to do if they wanted to. Two employees thought Mr. Ramerth suggested that one letter sent by each person was preferable (suggesting he was offering advice on the matter), but that he could not be involved in it. He refused to permit anyone in his office to type the letter. He was asked if employees could prepare this letter on company time and he did not answer. It appears that a kind of "group letter" was provided to Mr. Ramerth. One such letter was attached to the employer's response to the unfair labour practice applications, although it was not referred to in evidence. In addition many individual letters were filed with the Board and referred to during the hearing, as described below.

8. Following this meeting, some employees, such as Jason Veldman and Bruce Barclay, said that Mr. Ramerth followed up with them, asking if the Union had been around speaking to them. One instance occurred the next day, on August 6, when Mr. Ramerth attended at another job site on Woodleith Crescent in Ingersoll near the end of the day. Eight employees were there. Again, he characterized the meeting as a normal, daily work meeting, at which some time was spent discussing union organizing efforts. He asked Mr. Veldman if the Union had been back to attempt to solicit membership evidence from him. Mr. Veldman said that the Union had been around speaking to him. Mr. Ramerth's reply was that if the union bothered employees, they should call the police to make them leave. It was apparent to me, however, and was likely apparent to employees of Riverstone as well, that Mr. Ramerth had taken a keen interest in observing the general progress of the Union organizing campaign and the extent to which individual employees were being approached.

9. One piece of contextual evidence offered by the Union in the end is not particularly significant. For a certain period of time, new employees with Riverstone were required to fill out a

payroll information sheet and to sign it. At the bottom, employees were required to acknowledge the following statement:

> The above employee of Riverstone Masonry Inc. agrees that at no time whatsoever to attempt to create a union workplace while under the employment of Riverstone Management Inc. [sic].

Some employees had signed it and remembered having done so. However, those who did remember denied in the stand that it had had any influence on their behaviour.

10. Much argument was directed at the end of the day to the fact that 8 employees testified and all of them said that they did not wish to be represented by either union and that they held their convictions and beliefs sincerely. Each of them claimed to be uninfluenced by their employer. The relevance of this evidence is discussed below. Certainly they did not see their evidence as a neutral recitation of events they had observed. One employee explained that he had come to testify "to show that I'm on Ziggy's [Mr. Ramerth's] side and that I want to keep my job". The tenor of the evidence of some of the employee witnesses (although no one was subjected to particularly extensive or close cross-examination) was guarded and calculating. Responses were occasionally proceeded with "what are you trying to imply?" or lapsed into a consistent use of the passive voice to avoid being particularly informative.

11. Following the August 5 meeting, Mr. Pringle found that the organizing campaign had ground to a dead halt. Those employees who had been prepared to speak to him before that date were no longer prepared to talk to him at all. Certainly, no one was prepared to sign a membership application after that date. He filed the application on August 7, seeking relief under section 11.

12. Once the application was filed and the Board's notice posted on job sites, the employees all wrote letters to the Board. Trevor Lockyer collected them and faxed them to the Board on August 21, 2008. Each is typed or written, with the names of each individual employee signed at the bottom. They are all differently worded, but all contain the same theme: Riverstone Masonry cannot afford to 'go union' and, like other contractors, it will be unable to compete or will go out of business; the union should leave a small family business like Riverstone alone; the applications caused Riverstone (or in some cases the employees) to expend money and concern for which they should be compensated. The equation of certification by the Union and the loss of work or the shutdown of the business is a constant theme in each letter.

13. In procedural terms, the Board treated each of these letters as interventions and in fact most of the employees appeared at the Board on both hearing days.

14. Certain numbers are also relevant. The two Unions between them filed membership evidence on behalf of five persons from the list of 15-17 employees. The Board received letters from 14 employees. On the representation vote, each Union received one vote in favour of certification and all others were cast against it. Objectively, the organizing campaign was over by the evening of August 5 and the Union support was virtually gone by the date of the vote, August 15, 2008.

Decision

15. The statements by Mr. Ramerth at the August 5 meeting were statements that were intended to connect the prospect of "unionization" (i.e. certification and collective bargaining) with the loss of employment for the employees whom he addressed and, I conclude, they did so. It was not a question speaking to specific individuals, or a threat that the owner of the company would shut down or move away. However, the fact that the result is postulated as one that is inevitable as the result of marketplace forces, rather than the result of a specific decision by the owner of the company, does not make that threat any less real or persuasive. Mr. Ramerth did, after all, refer to the anticipated reaction or explicit statements of the builders who were Riverstone's customers. He would appear to any reasonable employee to be in a position to have that information directly from his customers.

16. I put little weight on the fact that some employees claimed to have spoken to the builders directly. Even assuming that evidence is true, that is, that the representative of a builder on a residential housing site would discuss the business arrangements it has with a subcontractor with an hourly paid employee of that subcontractor, any employee would expect his employer to have a surer feel of his customers' wishes.

17. Employers do have the right to speak freely to employees about the prospect of a union being certified, and no one expects an employer to be pleased at the prospect. Comments about changes to the relationship between employees and employer with a union added are commonplace and entirely permissible. References to what can be achieved in bargaining are generally permissible as well. However, to equate certification by the union with a loss of employment is a threat to the tenure or security of employment that is inherently coercive and intimidatory.

18. Counsel for the Employer asserts that Mr. Ramerth was simply "telling the truth" to his employees. There is, in fact, no evidence that Mr. Ramerth was, in fact, correct; I heard no evidence about the company's contracts, its typical profit and overhead profile, the prevailing pattern of bargaining with these two Unions, if any, or any other fact that will allow me to come to that conclusion as an objective fact. The fact that a customer may decline gratuitously to increase the price paid for services just because a contractor is facing a certification application is hardly surprising, nor is it proof of anything.

19. I do not doubt that Mr. Ramerth believes that certification of the Unions for employees of his company will lead to economic losses. Most employers faced with a union organizing campaign believe that to be the result. If it were true, one must wonder how it is that organized employers stay in business, or indeed why the unions represent any employees actively engaged in construction in this geographic area at all. A genuine and heartfelt belief on the part of the employer is not a reason for threatening the jobs of employees.

20. I find that the statements constitute intimidation and coercion, as that term is used in sections 70, 72(c) and 76. As the Board said in *Viceroy Construction Co. Ltd.*, [1977] OLRB Rep. Sept. 562, at paragraphs 11 and 12:

> 11. The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the terms of the

> Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is promoted by an anti-union motive, (e.g. section [72] of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security. Such conduct, apart from violating section [70], would be contrary to section [72(c)] …
>
> 12. The protection of the integrity of the individual's employment relationship is central to the scheme of The Labour Relations Act. This Board has consistently found breaches of the Act where statements have been made which threaten an individual's employment, and that has been so whether the threat was made by a union (e.g. *Walter Selck of Canada Limited*, [1964] OLRB Rep. [April] 138; *V/R Wesson Limited*, [1968] OLRB Rep. Nov. 811) or by an employer (e.g. *Bell & Howell Canada Ltd.*, [1968] OLRB Rep. Oct. 695).

21. The discussion about a "letter" was also designed to require employees to choose their side, their employer (and their job) or the Union (and unemployment). While, as counsel for the Employer acknowledged, the evidence about whether or not it was initially suggested by Mr. Ramerth is contradictory, employees certainly understood the intended public nature and purpose of any such document. Even if, as Employer counsel suggests, Mr. Ramerth "stepped away from" the idea of the letter, it would have been obvious to everyone at the meeting that it was something that he favoured. A group letter expressing a desire not to be represented by the Union, which is dated August 13, 2008, six days after the application was filed, is attached to the Employer's response to the unfair labour practice complains and is signed by seven (or perhaps eight) of the employees. The 14 interventions filed in the certification application are more detailed in their expression of support for the Employer and opposition to the Union for the same reasons: that is, that certification by the Union will result in a loss of employment for the employees.

22. The August 6 meeting did not feature the same sort of threat to employment. However, Mr. Ramerth had spoken to Jason Veldman (and perhaps others) on the evening of August 5 about whether or not they have had contact from the Union. He raised this in a meeting on August 6 and asked whether the Union had contacted first Mr. Veldman and then anyone else. By doing so, he made it clear that he took a specific interest in the campaign that he perceived as a threat to his business. Despite his assurances the day before that it was an employee's choice to join the Union (for those in attendance at both meetings), he wanted to know about the contacts made by the Union with each one of them individually. I have no doubt that this contributed to the obvious desire of employees to demonstrate their public support for their employer and for their continued employment. I find that this inquiry too was part of a process of using threats to employment as a way of requiring employees to choose their employer and employment or the union and unemployment. As such, it constitutes a violation of sections 70, 72(c) and 76.

23. Counsel for the intervenors argued that at least a quarter of the bargaining unit had not been at either meeting. That is true of one of them, Joe Yeoman, who said that he had found out about the meetings from co-workers. It was not necessary to hear the statements directly from Mr. Ramerth; the message got through to other employees in the bargaining unit through the later inevitable discussions.

Remedial Certification

24. The real question in this case is whether the Unions are entitled to relief under section 11. That section provides:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.
>
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
>
> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.
>
> ...
>
> (4) On an application made under this section, the Board may consider,
>
> (a) the results of a previous representation vote; and
>
> (b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

Much argument was directed at the question of whether or not these actions by the Employer in and of themselves would inevitably lead to the conclusion that employees would not be likely to express their true wishes, or whether, on the other hand, the evidence is, in the words of counsel "not so egregious that the Board can find no other remedy". Questions of "how much is enough" in the abstract are not of assistance to me. The Act requires the Board to look at the facts of each case and to decide whether, *as a result* of the employer's actions, the true wishes of employees will not be known by way of a second vote. In this case, it is absolutely clear that this is the result of the Employer's actions.

25. The Board has often treated threats to job security and, if such occur, actual discharges of employees associated with the union organizing drive, as being sufficiently intimidatory, given the employees' vulnerable position in an employment context, that the Board would conclude that it could not ascertain the true wishes of employees. One example of this analysis is found in *JAK Electrical Contractors Ltd.*, [1997] O.L.R.D. 4414. In that case, the employer spoke to a number of employees individually and gave them his "economic analysis" stating that if the union were able to successfully organize employees of the company, it would lose jobs because unionized rates were high compared to the rates then paid to the employees. There were other factual issues in that case (an increase in wages) but with respect to that one issue, the Board said:

> 129. It is a trite principle of law that certification pursuant to section 11(1) of the Act - commonly referred to as "automatic certification" - is an extraordinary remedy and one which ought to be applied by the Board cautiously.
>
> 130. As noted by the Board in the recent decision of *Maverick Mechanical Contractors Limited*, [1996] OLRB Rep. March/April 289, at paragraph 25, the Board has, generally, granted automatic certification in two broad categories of cases. Where an employer has made threats to the continued job security of its employees, conditional upon whether the union succeeded in its attempt to become certified, the Board has historically certified that union pursuant to section 11 of the Act (or its predecessors). Alternatively, the Board has certified a union automatically where a range of unlawful employer activities, none of which taken separately would lead to automatic certification, has the cumulative effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice.
>
> 131. In either of these two scenarios, it is well established that the remedy of "automatic certification" is not to be utilized by the Board in a punitive manner, but rather is a remedial option provided to the Board to ensure that an employer is not rewarded for its misconduct during a union organizing campaign. The legislature has recognized that it is inappropriate to permit an employer, through its own violations of the Act, to eliminate any chance that the true wishes of its employees could be reflected by way of a representation vote. Where the employer has acted in such a manner, the Act provides the Board with the power to automatically certify the union as the bargaining agent of the employees in the bargaining unit determined to be appropriate by the Board - whether the union would or would not otherwise have been successful in the absence of the unlawful conduct of the employer.

In the circumstances of that case, the Board analysed the employer's comments in the following manner:

> 144. The employer argued that it was not, during the discussions of its "economic analysis" with its employees, threatening or intimidating them, but rather was truthfully discussing with its employees the factual consequences of unionization. It will be recalled that the employer's previous experience with Local 353 representation of its employees was a significant slowdown in job opportunities. It was submitted by counsel that the employer was merely telling its employees a factual, objective truth; that is, that unless the entire electrical contracting industry in the Toronto area were to become unionized, the result of the company becoming unionized would be an inability to compete, price-wise, with the employer's competitors, and a subsequent loss of job opportunities, and therefore jobs.
>
> ...

> 148. In my view, the employer's argument must fail. It was entirely appropriate for the employer to comment on issues such as wages, benefits and competitiveness during the course of this organizing campaign, as long as it did not comment in such a way as to promise, threaten, coerce, intimidate or unduly influence its employees. Because of the highly sensitive nature of the concept of competitiveness, and its connection to job security, great care must be taken in how an employer comments on that issue. As noted by the Board in paragraph 36 of *Vogue Brassiere Incorporated*, cited above, "an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law". In order to ensure that it does not violate the Act, the employer must not make predictions regarding the impact of unionization in the abstract or that are speculative in nature. Any such prediction must be, as noted in the *Gissel Packing Co.* case, carefully phrased, be made on the basis of objective fact, and reflect the employer's belief regarding the demonstrably probable consequences of unionization. In my view, this is where the employer erred in its communications with its employees.

26. The Board has applied this decision, or the principle enunciated in it, in many instances, particularly those in the construction industry: see *Carlos Barbosa Concrete Limited*, [2008] OLRB Rep. May/June 334 (May 26, 2008), at paragraphs 55 to 56 (where the employer asked employees to consider "whether they wished to continue in full and steady employment"); *West Elgin Construction Ltd.*, [2005] OLRB Rep. May/June 502 (June 1, 2005) at paragraph 25 (where employees were told "if we become unionized, it may prevent us from working on many jobs"); *East Elgin Concrete Forming Limited*, [2007] OLRB Rep. Jul./Aug. 741 (July 18, 2007) (where employees were told that the company would lose some of their customers) and *Winston Construction Ltd.*, [1976] OLRB Rep. Nov. 714 (where employees were told certification of a union would result in layoffs and shorter working hours). These cases all arise in the construction industry, where employment is often short-term in nature and is subject to greater fluctuations due to changing markets. Layoffs may be accomplished in very little time and employment is simply more precarious.

27. The Board has concluded that such threats make it impossible to ascertain the true wishes of employees since "the truth will follow the employees into the voting booth in a subsequent representation vote" (*Carlos Barbosa Concrete Limited, supra*, at paragraph 46). In this case the task for the Board is to determine what a reasonable employee would likely conclude based on the objective nature of the facts rather than what employees say about their subjective feelings and beliefs in the stand. Counsel for the Employer argued that there was nothing in what any employee said to show that they had drawn a conclusion from what Mr. Ramerth said that the jobs were at risk. Frankly, that is not my reading of their evidence, including the letters they submitted in these applications as interventions. I conclude they received Mr. Ramerth's message with absolute clarity and have adopted his view that certification by the Unions will cost them their jobs. In the end, however, the subjective views of employees given in the evidence or in their written submissions are of no assistance in this case. If the threat has been effective, what would one expect to hear other than a parade of witnesses who wish to demonstrate their loyalty to their employer and their desire to keep their job? As the Board said as part of a much longer analysis in *JAK Electrical Contractors Ltd, supra,* at paragraph 38:

> But few, if any, employees would be willing, even under summons and under oath, to publicly announce that they would have voted one way but for their employer's conduct. As a practical matter, the witnesses for the union who could buttress its case would be individuals, previously identified by the union as supporters, who would have otherwise voted for the union but in fact did not because of the employer's conduct. It is highly unlikely that these people would be willing, in the presence of the employer at open

> hearing, to assert that their employer acted inappropriately towards them, to admit to their association with the union, and to their preference for union representation. The end result is that trade unions would be unable, in the normal course, to call this type of evidence in support of their cases. If the subjective evidence of the voters' "true wishes" is to have weight, and therefore to be capable of tilting the balance towards dismissal of the application, as a practical matter the automatic certification provision of the Act will become unavailable to trade unions for lack of evidence.

28. Objectively, a reasonable employee would take the statements made by Mr. Ramerth at the meeting as a statement that the company would be out of business very shortly after any union was certified. I conclude, as the Board has often done in similar cases, that these statements were sufficiently intimidatory and coercive that the Board cannot conclude that a subsequent representation vote will reflect the true wishes of the employees. Indeed, in this case, the evidence makes this abundantly clear. The Union's organizing campaign hit the proverbial brick wall after the August 5 meeting. Mr. Pringle's evidence describes an organizing campaign that was in progress up to that time, not one that had run out of steam and failed on its own. The group letter presented to the Employer attached to the response to the unfair labour practice complaints, and in greater detail, the letters to the Board make it clear that virtually all of the employees in the bargaining unit had made the connection between the Union being certified and a loss of their jobs. Everything employees said and did thereafter was designed to demonstrate, as Brady Baker said, that "I am on Ziggy's side and I want to keep my job". The collapse of the Union's support in a representation vote, despite the fact that it was a secret ballot vote, demonstrates that employees had taken a that message to heart.

29. For these reasons, I find that no remedy other than certification pursuant to section 11(2)(c) will be appropriate and that no other remedy would be sufficient to counter the effects of the Employer's contravention of the Act.

The Section 96 applications in Board files 1448-08-U and 1449-08-U

30. I find that the employer has violated sections 70, 72(c) and 76 of the Act. Given that the Unions' primary interest in bringing these applications is the relief sought under section 11, no other relief is necessary or warranted. Since almost all employees were treated as intervenors, all of them will receive a copy of this decision, and a posting is not necessary.

Application by Labourers' International Union of North America, Local 1059 (Board File 1447-08-R)

31. In its decision of August 13, 2008 the Board found the following bargaining unit to be appropriate for collective bargaining:

> all construction labourers in the employ of Riverstone Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Riverstone Masonry Inc. in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.

32. Since I have concluded that it is appropriate to certify the applicant as the bargaining agent of the employees in this bargaining unit pursuant to section 11(2) (c), certificates will issue to the applicant.

33. Section 160(1) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> **160.**(1) The Board shall certify the trade unions on whose behalf an application for certification is brought as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade unions. The Board shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 160(1) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers in the employ of Riverstone Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

34. Further, pursuant to section 160(1) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of Riverstone Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

35. The Registrar will destroy the ballots cast in the representation vote taken in these matters following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

Brick and Allied Craft Union of Canada (Board File 1446-08-R)

36. In its decision of August 13, 2008 the Board found the following bargaining unit to be appropriate for collective bargaining:

> all bricklayers and bricklayers' apprentices in the employ of Riverstone Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, in all sectors of the construction industry save and except non-working foremen and persons above the rank of non-working foreman.

37. Since I have concluded that it is appropriate to certify the applicant as the bargaining agent of the employees in this bargaining unit pursuant to section 11(2) (c), a certificate will issue to the applicant.

38. This application is not filed by an Employee Bargaining Agency or an Affiliated Bargaining Agent. It is therefore an application to which subsection 158(4) applies.

39. Pursuant to subsection 128.1(13) of the Act, a certificate will issue to the applicant trade union in respect of all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the responding party in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, in all sectors of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman

40. The Registrar will destroy the ballots cast in the representation vote taken in these matters following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

41. The responding party is directed to post copies of this decision immediately, adjacent to the "Notice of Vote and of Meeting" posted previously. These copies must remain posted for a period of 30 days.

4237-05-R; 0139-06-R Labourers' International Union of North America Ontario Provincial District Council, Applicant v. **Swift Railroad Contractors Corporation**, Responding Party; Labourers' International Union of North America Ontario Provincial District Council, Applicant v. Swift Railroad Contractors Corporation, Responding Party

Certification – Constitutional Law – Construction Industry – Non-Construction Employer – LIUNA filed two applications for certification (industrial and construction) – The responding party argued that it was a federal undertaking and therefore governed by the *Canada Labour Code*, that its employees were performing maintenance and not repair (hence, not construction) and, because of the nature of its work, that it was a non-construction employer under the Act – The Board held that the federal and provincial governments had reached agreement after 1995 for CN and CP to divest themselves of certain shortline, intra-provincial, rail lines; the work of the employer was "to" the rail lines, and did not pertain to the operation of the lines; therefore, the labour relations of the employer was governed by provincial legislation – The Board found further that the work of the employer was intended to "sustain and maintain" the rail system that would enable the system to operate efficiently; there was no breakdown of the system; and, since there was no "addition to" an existing facility, the work was maintenance and not construction – Finally, the Board ruled that it did not need to determine whether the employer was a non-construction employer, since such an application is premised on the existence of a collective bargaining relationship – Industrial certificate issued

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Benjamin Barnes* and *Paul Hickey* for the applicant; *Gregory McGinnis* and *Rod Swift* for the responding party.

DECISION OF THE BOARD; January 27, 2009

Introduction

1. Board File 4237-05-R is an application for certification in the construction industry that was filed with the Board by the applicant ("LIUNA" or "the union") pursuant to section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act"), on March 22, 2006. Board File 0139-06-R is an industrial application for certification that was filed with the Board by the union on April 13, 2006. In the latter proceeding, a representation vote was held on April 24, 2006.

2. A number of preliminary issues in these proceedings have been dealt with previously by the Board. When these proceedings came on for hearing, the parties had agreed that three further preliminary issues raised by the responding party ("Swift Railroad" or "the company") would be the subject of evidence and argument. This decision relates to those preliminary issues.

3. The three preliminary issues to be decided are the following:

> (a) Is labour relations between Swift Railroad and its employees governed by the Act or by the *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended?
>
> (b) Assuming that the answer to the first question is that the Act governs labour relations matters between Swift Railroad and its employees, on the application filing date was the work performed by the employees of Swift Railroad work in the construction industry?
>
> (c) Assuming that the answer to the first question is that the Act governs labour relations matters between Swift Railroad and its employees, is Swift Railroad a "non-construction employer" for the purposes of the Act?

4. Over the course of a number of hearing days, the Board heard the oral evidence of one witness, Mr. Rod Swift, the President of Swift Railroad. Mr. Swift was a credible witness, and his testimony was fairly given. As a result, for the most part the facts are not in dispute.

The Facts

5. Swift Railroad was established on April 1, 1987. As will be described in considerably more detail below, Swift Railroad provides certain services and supplies to third parties with respect to what will be neutrally characterized in this decision as the "upkeep" or "rehabilitation" of railroad tracks in the Province of Ontario. Its head office is located in Smithville, Ontario. At the site of its head office, Swift Railroad maintains a yard for the purpose of storing its equipment and materials. Swift Railroad also maintains a yard in New Brunswick.

6. Some basic background regarding the infrastructure upon which the business of Swift Railroad is based is helpful. In Canada, railways are regulated both federally and provincially. Federally, the most significant legislation relating to the operation of railways consists of the *Canada Transportation Act*, S.C. 1996, c. 10 (and, in particular, Part III of that legislation), and the *Railway Safety Act*, R.S.C. 1985, c. 32. In Ontario, the relevant legislation for the purposes of this proceeding

is the *Shortline Railways Act*, 1995, S.O. 1995, c. 2, which legislation governs the licensing and operation of shortline railways in the province.

7. Shortline railways developed in Ontario as a response to decisions made in the early 1990's by the Canadian National Railway (the "CNR") and the Canadian Pacific Railway (the "CPR") to discontinue the use of certain railway lines in the province and to lease those lines to locally-based railway companies, which in turn would use the railway lines to run a locally-based train service. Shortline railway companies lease track from either the CNR or the CPR and provide the machinery and equipment required to operate a railway over the tracks they have leased. The track owned by the CNR and the CPR is broken down into numerous "subdivisions" for the purpose of leasing certain portions of that track to shortline railways. Shortline railways act as a link between businesses that are located on branch lines and the main tracks operated by the CNR and the CPR. Swift Railroad is not a shortline railway, and it does not operate a railroad. It owns no locomotives or freight cars. It is not licensed, either provincially or federally, to move freight over rail lines. Instead, it provides services to those entities that operate shortline railways and move freight over rail lines in the province of Ontario.

8. A large portion of the services provided by Swift Railroad consists of track rehabilitation – rehabilitation of the track itself and/or the railway ties that anchor the track to the ground. Swift Railroad has been engaged by a number of shortline railways located in the Province of Ontario (including the Huron Central Railway, the Goderich-Exeter Railway and the Port Colborne Railway, which is now known as the Trillium Railway) to assist in the rehabilitation of the subdivisions that they have leased from the CNR or the CPR. Swift Railroad has also been engaged by a number of businesses that do not themselves operate a shortline railway in order to rehabilitate track that is located on property that they own or lease. In these circumstances, the track typically allows for freight to be delivered to or from a particular business' facility.

9. For the most part, the rehabilitation work performed by Swift Railroad is performed on live track. The work often starts late in the afternoon or in the early evening, and is performed throughout the evening and overnight. Special permits are secured by the client from Transport Canada in order to allow Swift Railroad to perform the work on live track, and the limitations imposed by the permits are communicated by the railway to the Swift Railroad foreman before the work commences. A flagperson from either the CNR or the CPR is always present to ensure that the Swift Railroad crew is off the track when a train is scheduled to pass through the area upon which work is being performed. Because the work done by Swift Railroad typically requires certain machinery to be physically on the track rails, at various stages of the rehabilitation process there is a degree of coordination required between the Swift Railroad crew and the flagperson to ensure that the track is cleared and functional when a train passes by. Although the track being worked upon is not always 100 percent complete when a train passes, it is made safe in order to permit the train to pass by, after which time the Swift Railroad crew returns to the location to complete the work.

10. In order to appreciate the nature of the work performed by Swift Railroad, it is helpful to describe in some detail the services provided by Swift Railroad, how those services are delivered to its clients, and the equipment utilized to provide those services.

11. Replacement of railway ties is a core service offered by Swift Railroad. Mr. Swift gave extensive evidence regarding the processes utilized by Swift Railroad to replace railway ties. Shortline railways retain Swift Railroad to replace railway ties when those ties become weak.

Employees of the railway regularly inspect its tracks and identify the ties that they want replaced by marking them with a paint stick. Shortly thereafter, a number of Swift Railroad employees will attend at the location where the work is to be performed, along with all of the equipment necessary to replace the ties in question. The equipment required to replace a large quantity of railway ties includes a hydraulic spike puller, a tie knockout machine (referred to as a "TKO"), a scarifier, a plate jack, a spiking machine, a regulator, and a boom truck. All of the equipment, including the boom truck, is hi-rail equipped, so that it can operate from the train rails themselves. The equipment that is required to be placed onto the rails for this work is initially loaded onto the rail by the boom truck at a back track, from which easy access to the main track is available. The equipment placed onto the rail is, at the appropriate time, moved onto the main track and relocated to the work site.

12. The first piece of equipment utilized in the tie replacement process is a hydraulic spike puller. It removes the spikes along the track, on both sides of the rails. The next piece of equipment utilized is the TKO. It is typically a few hundred feet behind the hydraulic spike puller, and its initial function is to physically grab the loosened rail and to lift it up slightly. At the same time, an arm extended from the machine hits the end of the tie and kicks it out approximately 2 feet from its resting position. Another arm of the machine then grabs the tie and removes it the rest of the way. The removed tie and the accompanying tie plates are placed onto the track bed, where the tie will be collected later.

13. The TKO is then used to install a new tie. Replacement ties (they can be new or used) have been previously placed by the side of the track. A replacement tie is secured by the extended arm of the TKO and is inserted back into the location from which the old tie was removed. If the hole needs to be cleaned out before the replacement tie can be inserted, the scarifier – a rotary auger – is directed into the old hole in order to clean it out and to open it up.

14. Next, a plate jack – which is typically located some 200 to 300 feet behind the TKO – comes along and jacks up the rail approximately one inch, so that the tie plates previously removed from the old tie can be replaced manually. After that, a spiking machine is introduced. It has four spike guns which drive spikes into the tie plate, on the inside and the outside of each rail. It also pushes the tie down, thus bringing the tie tight to the rail. After these processes have been completed, the stone around the ties is graded and the profile of the track is restored. This latter process is completed by the regulator. Once all of the holes and gaps are filled, excess stone is pushed off the track and a large broom sweeps the track clean. As the work proceeds, all of the scrap ties are grouped together into piles of 50 or 60 by way of a tie crane that is anchored on the boom truck. Usually the railway that retains Swift Railroad is responsible for disposing of the old ties. The tie replacement work performed by Swift Railroad is inspected by both its client - the shortline railway - and by Transport Canada. Swift Railroad has performed tie replacement work for many of its shortline railway clients.

15. Mr. Swift also testified regarding another core service provided by Swift Railroad, namely the rehabilitation of railway track itself – what Mr. Swift referred to as the replacement of "sperry rail". As will be outlined in greater detail below, considerable work of this nature was performed by Swift Railroad late in 2005 and early in 2006, immediately before the filing of these two applications for certification. For some of this work, its clients were shortline railways. However, Swift Railroad has also performed this work directly for the CNR.

16. As a general observation, the process of track rehabilitation requires Swift Railroad to remove certain sections of the rail and to replace the old rail with either new rail or the same rail that has been re-welded and/or re-drilled. This work, like tie replacement, is performed while the track is live. The process of rehabilitating railway track commences with the use of a car that is placed onto the track in order to ultrasound the rails. Ultrasound technology permits for identification of latent flaws in the rail. Shortline railways typically perform this ultrasound work with their own staff and mark those rails that contain flaws with a paint stick. The severity of the flaw dictates whether the work performed by Swift Railroad must be done immediately or can wait to be done within the six month period following its identification. To fix the problem, Swift Railroad will remove a piece of the rail in question and replace it with another piece of rail without the flaw. When the rail is removed, it is brought to a staging yard to be worked on by employees of the company. Two pieces of rail will often be cut and welded together to form longer pieces which are subsequently installed in other locations. The purpose of doing this is to minimize the number of joints in the track, which in turn minimizes the number of potential future flaws.

17. In order for Swift Railroad to replace flawed track, a permit is secured from Transport Canada by the client railway that outlines the times during which the work can be performed. The process starts with the placement of the new rail to be installed on the side of the track, between the shoulders of the track and the ditch. Subsequently, a speed swing that rides on the rails will move three or four of the lengths of track onto the middle of the track. The work is performed on one side of the track at a time. A spike puller will remove the spikes on the rail to be replaced, and a bolting machine (which also rides on the rails) will remove the bolts from the joints of that rail. Once unbolted, the speed swing sets the old piece of rail onto the shoulder of the track. The spikes, anchors and tie plates that hold the rails to the track are secured by employees of Swift Railroad, and set aside.

18. At this point, a small machine called a Cribber sweeps the stone out from between the ties where the rail sits. The holes in the tie where the spikes previously sat are manually filled with tie plugs, because the new rail, once spiked down, may not line up exactly in the same position as the old rail. Next, an Adzr machine (which rides on the rails) planes the face of the tie where the rail will sit, so that the rail and plates will sit flush and level. The plates that were removed previously are then placed back onto the tie, unless they were broken or damaged, at which time a replacement plate is placed onto the tie. The new rail is placed onto the track with the speed swing roughly in the position where it will be secured. One end is bolted into the existing rail, and the track is hand-gauged and hand-spiked every fifth tie down the line to ensure a proper vertical width of the track. It is bolted to the existing line at the other end. Subsequently, an employee of Swift Railroad comes along to straighten up the plates and to spike the balance of the ties with a hydraulic spiker. Usually a tamper will also be utilized in order to ensure that the ties are snug to the rail. Anchors are then manually installed onto the base of the rail with a sledgehammer in order to stop the rail from moving laterally due to heat and cold, and the work area is cleaned up. Any broken plates and other used material are removed and stockpiled for the railway at the nearest siding. This process continues until the crew is required to clear the line.

19. Similar to the replacement of railway ties, when rail rehabilitation work is performed a flagman from the CNR or the CPR is at the worksite. He walks up and down the section of the track being worked upon, and checks out the next location to which the Swift Railroad crew will be going. Once completed, the railway rehabilitation work performed by Swift Railroad is inspected by its client and by Transport Canada.

20. Another core service provided by Swift Railroad for its shortline railway clients is the supply of manpower and equipment to remedy derailments. Derailments are the result of bad track conditions, poor train handling, or a combination of both. As one might imagine, this work is not scheduled in advance, and arises in an *ad hoc* manner. The primary goal is to remove any debris off the track and to fix the track so that trains can continue to get through. Mr. Swift testified regarding a number of derailments worked on by Swift Railroad. In Mr. Swift's experience, at a derailment site a supervisor from the shortline railway, the CNR or the CPR has been responsible for directing all crews at the site. This work is performed on live track.

21. Swift Railroad has been retained by shortline railways to perform other work on railway lines. It has been retained to shim up rail lines when the shortline railways are too busy to perform this work with its own forces. The shortline railway typically sends its crews onto the rail lines to identify low spots that need to be shimmed up. The client marks the locations and provides Swift Railroad with a rough idea as to where on the track the work needs to be performed. A permit to perform the work is secured from Transport Canada, and a Swift Railroad crew does the work using a hi-rail pick-up and various hand tools. At the spot where the work is to be performed, the spikes are pulled up on six to 12 ties, the centre of the track is jacked up, and shims are inserted in order to provide the rail with a slight crown in the centre. Then the rail is spiked back down and the crew moves onto the next location.

22. Swift Railroad also provides labour services to its shortline railway clients. It has assigned a foreman and a small crew to assist a crew from one of its clients that was measuring track geometry for the purpose of fixing various minor imperfections, including a few bad ties, by hand. Mr. Swift testified that the company performs this type of work quite often if its clients get behind on their day-to-day track work. Similar to the more comprehensive tie replacement and rail rehabilitation work, this type of work is performed on live track. Swift Railroad has also been hired by one of its shortline railway clients to clean up a yard that was not previously in use in order to make it available for service.

23. As noted above, the company's customers include many business entities that are not railways. In fact, the evidence establishes that Swift Railroad performs a considerable amount of work for non-railway clients. By way of example, Swift Railroad has rehabilitated road crossings for many of its non-railway clients. When Swift Railroad is retained to perform road crossing rehabilitation work, the extent of the work performed depends largely upon what the client desires. On some crossings, planks are removed, the crossing is entirely resurfaced (the rails are levelled in order to ensure a proper track profile, whether it be flat or banked), and the planks are replaced. A backhoe, boom truck, and certain hand tools are used to perform this kind of work. Again, this work is performed while the track is live, and requires a permit and a flagman. Mr. Swift testified that when replacing a rail crossing, Swift Railroad is not responsible for securing the necessary approvals from Transport Canada to perform the work. The client that retains Swift Railroad is responsible for doing so.

24. As noted earlier, the business of Swift Railroad also extends to the supply of railway materials that are unrelated to the provision of services. The evidence establishes that Swift Railroad has periodically sold to its shortline railway clients used railway ties, switch ties, bridge timbers and components. It has also provided these same types of railway materials to clients that are not shortline railways – examples being used railway ties to a hardware store, a farm and a feed mill for landscaping purposes, and scrap rail to a company that handles materials in the pulp and paper

industry in New Brunswick. It has sold rail that it had previously secured from an abandoned rail line in Albany, New York to a client in Quebec. The company has supplied a truck to the CPR for the purpose of moving equipment, and it has moved ties for that same client on a number of occasions. In 2004, Swift Railroad supplied 12 switch stands – the stand that contains the lever that moves a switch from one side to the other – to a company that performs railway repairs, and five switch stands to another such company. That same year, it sold spikes and plates to a demolition contractor that had previously subcontracted with it to remove some track from a blast furnace that was being demolished at Stelco.

25. Swift Railroad also performs other work with its own forces and equipment. It has been retained by clients to remove snow from railway tracks during the winter. To do so, it utilizes its regulator, which is fitted with a snow plow attachment. The work is typically performed for clients on switches or in their yards. Snow removal has been performed by Swift Railroad for railway customers (the Huron Central Railway, the Goderich-Exeter Railway, the CNR and VIA Rail being examples) and for non-railway customers (ETI in North Bay and Innophos in Port Maitland). Mr. Swift testified that Swift Railroad has provided support staff to the Goderich-Exeter Railway when it requires extra personnel to clear snow or to perform maintenance work. In addition, Swift Railroad has been retained by competitors and clients to provide equipment and staff on a short-term basis (for example, a tamper and the regulator, and the staff required to operate them).

26. Swift Railroad has been retained by both its industrial and its railway clients to bring their track rails back into gauge. The company has also performed regular inspections of its industrial clients' rail systems in order to ensure that those systems remain within the required regulatory standard. If an inspection identifies a problem, work is usually performed to ensure that the required standard is maintained. Swift Railroad has also been retained to perform specific upgrade work for some of its industrial clients.

27. During the course of his testimony, Mr. Swift identified a Vendor Questionnaire prepared in October, 2004 by Swift Railroad for VIA Rail. Mr. Swift testified that in order to supply materials and labour to VIA Rail, it was necessary for the company to complete the questionnaire and send it to VIA Rail. The questionnaire as completed by Swift Railroad describes the business of the company as that of a "Railroad Contractor" and indicates that it performs "Railroad Construction and Maintenance". Under the listing of the various products and services offered to VIA Rail, the company listed, amongst other things, "construction, sidings, crossings". The Vendor Questionnaire also lists three projects as major orders that the company had completed during the prior five years. All three of the projects were completed for shortline railways (two for the Huron Central Railway, and one for the Southern Ontario Railway).

28. Turning to the work performed by the company shortly before the filing of the applications for certification, Mr. Swift testified regarding two contracts that resulted in Swift Railroad performing considerable rail welding work during 2005 and 2006. For four months in 2005, Swift Railroad was engaged by Holland L.P. (hereinafter "Holland") as a subcontractor in order to perform flash butt welding for Holland on CNR track located on the Kingston subdivision. The purpose of this project was to eliminate sperry rail at certain places on the track and to change insulated joints at road crossings in order to facilitate the signal systems then in place. Swift Railroad provided to Holland the labour – approximately 13 employees - and other equipment required to perform this work. In particular, Swift Railroad supplied two hi-rail trucks, two speed swings, a web polisher and a profile grinder. Holland provided what was referred to by Mr. Swift as a "Holland

Truck" to assist Swift Railroad in the performance of the work. A Holland Truck is a large vehicle that hydraulically clamps two pieces of rail together in order to spot weld them. The process is computerized in order to ensure that the two pieces are properly burned together. The web polisher is used to clean the rail on both sides of the cut, in order to ensure that there is a good connection, and the profile grinder is used post-weld to smooth the top of the rail and to establish a good profile for the head of the rail.

29. The rail located on the Kingston subdivision is continuously welded rail, colloquially known as "ribbon rail". Ribbon rail is continuous rail without joints, and is the preferred type of rail because it reduces maintenance costs and results in less wear and tear on track ties. On the Kingston subdivision, the rail had been x-rayed and flaws had been detected at certain places. The role of Swift Railroad was to eliminate the flaws and to effect "joint elimination" - to cut out 15 or 20 foot sections of the ribbon rail, and weld into place a piece of replacement rail without any joints.

30. With respect to the replacement of flawed rail, the process used on this job was similar to the replacement process identified above at paragraphs 16 to 19. The flawed spots had been marked on the rail by employees of the CNR and were located by the crew from Swift Railroad. The rail was cut and the spikes were removed. The anchors that keep the track in place were removed for 300 feet, and a new piece of rail was cut to replace the piece removed. The new piece of rail was put into place and the web polisher was brought in to polish up the ends to be welded. The Holland Truck was brought to the location in order to weld one end into place. It was positioned over the other end of the track to be installed and pulled the rail tight before it welded that joint. The welder held the sections together until it cooled down and then released the sections. The profile grinder was then used to ensure that the head of the rail was properly profiled. Once that process was completed, the locations were spiked back up, the anchors were pounded back into place, and the crew moved on to the next location. This process was undertaken when the track was live, and a permit was secured in order to perform the work on the track. The CNR provided a flag person for the work and performed visual inspections.

31. As noted above, Swift Railroad was also responsible on this job for changing insulated joints at road crossings. The crossing and track lights work by way of a system wherein a train, by passing over certain joints in the track, turn the lights on and off at the next road crossing once the train wheels connect with the joints. These joints must be replaced every year or two, depending upon the extent of train traffic through the subdivision. On this job, 19 foot lengths of rail with a previously-installed insulated joint were provided to Swift Railroad by the CNR. Swift Railroad was responsible for cutting out the old piece of rail and welding in the new one at the same location. For the most part, the same process used to eliminate the sperry spots in the ribbon rail identified immediately above was used to replace the insulated joints at the road crossings. A signal maintainer was on site to connect and disconnect the wires once the rail was replaced.

32. In 2006 Swift Railroad performed more of this work, but under circumstances that were different from those in existence when it performed the work in 2005. In 2006, rail replacement was performed for the CNR on the Stamford subdivision, which is located between Fort Erie and Niagara Falls, Ontario. During 2006, Swift Railroad was the main contractor with the CNR responsible for ensuring that the work was performed, and Holland was a subcontractor to it – responsible for providing a Holland Truck to Swift Railroad for the purpose of performing the work. For the eight to ten week period from February 6, 2006 (and therefore at the time of the filing of both applications for

certification), Swift Railroad was engaged in the welding program on the Stamford subdivision as the main contractor for the CNR.

33. The Rail Welding Service Contract between the CNR and Swift Railroad relevant to the work performed in 2006 provided, in part, that Swift Railroad was to provide "turnkey" rail welding service at the CNR's Kingston, Dundas, Stamford and Soo subdivisions. "Turnkey" is defined in the contract to mean "the scope of work required to repair identified rail defects" including "distribution and scrap pick-up services required as part of the repair welding process".

34. The nature of the work performed by Swift Railroad on the Stamford subdivision in 2006 was largely the same as that performed on the Kingston subdivision in 2005 – joint elimination and repair welding. Mr. Swift testified that the ribbon rail on the Stamford Subdivision extended from road crossing to road crossing, where an insulated joint was required to operate the crossing lights. As in 2005, a permit was required in order to perform the work, a CNR flagman was on site while the work was performed, and the work was performed when the track was live. A portion of the rail on the Stamford Subdivision was ribbon rail, and part of it was not. To the extent that rail was not ribbon rail, one of Swift Railroad's obligations on this job was to make those sections into ribbon rail. The seed rail for the work was provided by the CNR. On this particular job, a propane rail heater which rides on the rail was used by Swift Railroad to heat the rails for de-stressing, and a Behr saw was used to cut the rail. Otherwise, the same type of machinery was used on the Stamford subdivision as had previously been used the year before on the Kingston subdivision – two hi-rail trucks, a speed swing, a web polisher, a profile grinder and various hand tools. Holland supplied the welding truck and two or three employees to effect the welding.

35. The work performed by Swift Railroad on the Stamford subdivision was invoiced to the CNR. Mr. Swift testified that the company's crew was directed to the work to be performed by the CNR flagman on site, who was present throughout the duration of the work.

36. One other piece of evidence of potential relevance was placed into evidence. Swift Railroad placed a business-card sized advertisement in the Spring, 2006 edition of Interchange, the official publication of the Railway Association of Canada. The advertisement invites readers – who Mr. Swift acknowledged would include people in the railroad industry – to call Swift Railroad "for all your construction, maintenance and material needs".

Decision

(a) Is labour relations between Swift Railroad and its employees governed by the Act or by the *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended?

37. The parties were not in dispute regarding the relevant legal principles applicable to resolving the question of whether the labour relations between Swift Railroad and its employees is governed by federal or provincial law. As is often the case, however, the parties differed on how the law should be applied to the facts.

38. One of the seminal decisions speaking to the question of whether federal labour legislation ought to apply to work performed on a particular project is *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754, [1978] S.C.J. No. 110 (hereinafter "*Construction Montcalm*"). In *Construction Montcalm* the issue in dispute was whether Construction Montcalm

was subject to the minimum wage legislation and other similar Quebec statutes governing labour relations in the construction industry. The construction work in question had been performed at the location of Mirabel airport, on federal Crown land. As a result, it was asserted by Construction Montcalm that federal legislation – and not the legislation of the province of Quebec – applied to the employees in question. A Superior Court judge agreed with this assertion, but the Quebec Court of Appeal concluded that provincial law applied. The issue was appealed to the Supreme Court of Canada.

39. A majority of the Supreme Court of Canada dismissed the appeal. Beetz J., on his own behalf and on behalf of six other judges, identified a number of principles that applied to the resolution of this question (at pages 768 and 769). These principles are the following:

> (a) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule;
>
> (b) By way of exception, Parliament may assert exclusive jurisdiction over matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject. Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations only if it is demonstrated that federal authority over those matters is an integral element of that federal competence; and
>
> (c) The question of whether an undertaking, service or business is a federal one depends upon the nature of its operation. In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as a going concern, without regard to exceptional or casual factors.

Applying the first two of these principles, Beetz J. found that the construction of an airport was not in every respect an integral part of aeronautics, which is a federally-regulated subject. Although decisions regarding the question of whether to build an airport and where to build it constitute matters of exclusive federal concern (even though aspects of airport construction may be involved), the court held that the mode or manner of constructing the airport are not. Beetz J. observed, for example, that health and safety obligations have "everything to do with construction and with provincial safety regulations and nothing to do with aeronautics" (at page 771). The wages to be paid to employees working on site was determined by Beetz J. to be "so far removed from aerial navigation or from the operation of an airport" that it could not be said that the power to regulate formed an integral part of primary federal competence over aeronautics or was related to the operation of a federal work, undertaking, service or business.

40. Applying the third principle identified above, Beetz J. rejected the argument that a decisive factor ought to be the constitutional jurisdiction of the project the employer was completing at the relevant time. Beetz J. noted that if that were the case, constitutional authority over labour relations would vary with the character of each construction project. To accept that approach would be to disregard "the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors". The ordinary business of Construction Montcalm was,

according to Beetz J., "the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business". Similarly, Beetz J. rejected the proposition that constitutional authority should be determined by reference to the fact that the work in question was performed on federal Crown lands. Ultimately, the appeal was dismissed, and the decision of the Court of Appeal was confirmed.

41. The Supreme Court of Canada next dealt with this question in two decisions involving Northern Telecom – *Northern Telecom Ltd. v. Communications Workers of Canada*, [1979] 1 S.C.R. 115, [1979] S.C.J. No. 98 (hereinafter "*Northern Telecom No. 1*") and *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 733, [1983] S.C.J. No. 55 (hereinafter "*Northern Telecom No.2*").

42. In *Northern Telecom No. 1*, the question before the Supreme Court was whether certain installers employed by Northern Telecom were employed upon or in connection with the operation of a federal work, undertaking or business within the meaning of the *Canada Labour Code*. Both the Canada Labour Relations Board and the Federal Court of Appeal concluded that the employer and supervisors concerned were engaged in a work, undertaking or business to which the *Canada Labour Code* applied. The Supreme Court of Canada upheld those decisions.

43. Mr. Justice Dickson, on behalf of the entire court, concluded that there were insufficient constitutional facts before the court to permit it to resolve the question of constitutional jurisdiction over the installers employed by Northern Telecom. As a result, the appeal was dismissed on the basis that the appellant failed to show reversible error on the part of the Canada Labour Relations Board. However, in the course of its decision, the court confirmed the relevant constitutional principles to be applied, drawing from the reasons of Beetz J. in *Construction Montcalm*. Dickson J. also observed (at page 132) that in determining constitutional jurisdiction in labour matters, one must first begin with the operation at the core of the federal undertaking. Then, the courts are to "look at the particular subsidiary operation engaged in by the employees in question" and arrive at a judgment as to the relationship of that operation to the core federal undertaking. For federal law to apply, the relationship to the core federal undertaking must be "vital", "essential" or "integral". Furthermore, the court noted (at page 135) that there is a need to look to continuity and the regularity of the connection, and not to be influenced by exceptional or casual factors. In that regard, Dickson J. stated that "mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction".

44. In *Northern Telecom No. 2*, the factual record was considerably more complete. The question before the Supreme Court of Canada was essentially the same as that before the court in *Northern Telecom No. 1* – namely whether labour relations respecting installers employed by Northern Telecom was governed by the *Canada Labour Code* or by provincial labour legislation. The Canada Labour Relations Board determined that provincial jurisdiction applied, but referred this issue to the Federal Court of Appeal pursuant to section 28(4) of the *Federal Court Act*. The Federal Court of Appeal determined that the Canada Labour Relations Board had jurisdiction in the circumstances. On appeal to the Supreme Court of Canada, a majority of the court agreed.

45. Mr. Justice Estey, on behalf of the majority of the court, reviewed the case law, including the Supreme Court's prior decisions in *Construction Montcalm* and *Northern Telecom No. 1*. After identifying the constitutional facts before the court, Estey J. noted (at page 755) that the principal and dominant consideration when applying the principle that federal jurisdiction should not apply to

employees who are employed at remote stages, but only to those whose work is intimately connected with a federal work, undertaking or business, is an examination of "the physical and operational connection" between the installers and the federal core undertaking, which was the Bell Canada telephone network. In particular, the extent of the involvement of the installers in the establishment and operation of the telephone network as an operating system had to be examined. Other subsidiary but important considerations were the importance of the work done by the installers for Bell Canada as compared with other customers of Northern Telecom, and the corporate interrelationship between Bell and Northern Telecom.

46. Turning to the facts of the case before him, Estey J. noted that the work of the installers was to install switching and transmission equipment in the telecommunications network, which installation work was carried on at the premises of Bell, its affiliates, and, to a much lesser extent, the other customers of Northern Telecom. The equipment manufactured by Northern Telecom was manufactured by other employees with whom the installers had no contact. Bell purchased 90% of its switching and transmission equipment from Northern Telecom, and 95% of that equipment was installed by Northern Telecom. Installation work for Bell Canada accounted for 80% of the work of the installers in question. Estey J. noted (at page 760) that the issue in dispute was not to be determined by reference to "a microscopic examination of the considerable amount of detail involved in the description of the daily work routines of the installers", but instead "on an overall assessment of the record, documentary and testimonial, in order to ascertain whether the installers are engaged integrally in the operation of a federal work … or whether, on the other hand, these services are truly performed as the last act in the manufacture by Telecom of their specialized products in switching and transmission". Estey J. also noted (at page 762) that there existed "a very close, tightly scheduled integration of the services performed by the installers and the acceptance of those services by the employees of Bell into the telecommunications network without interruption of the performance of the network at the time".

47. On these facts, the majority of the court concluded that the labour relations jurisdiction of installers employed by Northern Telecom was federal and not provincial. The almost complete integration of the installers' daily work routines with the establishment and operation of the telecommunications network made the installation work an integral element of that federal work. The broadening, expansion and refurbishment of the network was a joint operation between Bell Canada and Northern Telecom staff, and the expansion or replacement of the switching and transmission equipment was vital to the continuous operation of the network and was closely integrated with the delivery systems of the network. In addition, the work consumed a very high percentage of the work performed by installers. In these circumstances, federal jurisdiction over the labour relations of installers was found to be "inexorable".

48. The principles to be applied are identified in the Supreme Court decisions set out above. As noted earlier, the parties disagreed with the application of those principles to the facts of this case.

49. During the course of argument counsel for the company reviewed the decisions in *Construction Montcalm*, *Northern Telecom No. 1*, and *Northern Telecom No. 2*, all cited above. He also reviewed the decisions of *R.F. Welch British Columbia Limited*, [1982] B.C.L.R.B.D. No. 7, *Bernshine Mobile Maintenance Ltd.*, [1986] 1 F.C. 422, 85 C.L.L.C. 14,060, 22 D.L.R. (4th) 748, *R. v. LeBlanc & Royale Telcom Inc.*, (1994), 18 O.R. (3d) 737 (C.A.) and *Phasecom Systems Inc.*, [2005] OLRB Rep. July/August 688 (Aug. 24, 2005). Counsel for the company also reviewed during argument Part III of the *Canada Transportation Act*, S.C. 1996 c. 10, the *Railway Safety Act*, R.S.C.,

1985, c. 32, the *Shortline Railways Act*, S.O. 1995, c. 2, and a number of the cases provided by counsel for the union.

50. During his argument, counsel for the union reviewed the following cases for the purposes of this portion of the proceeding: *Construction Montcalm*, *Northern Telecom No. 1*, and *Northern Telecom No. 2*, all cited above, *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, [1990] S.C.J. No. 136, *AXOR Construction Canada Inc.*, [1999] OLRB Rep. November/December 933, *Antioch Construction Corporation*, (1986), 13 CLRBR (NS) 1, *Re Canada Labour Code*, [1987] 2 F.C. 30, [1986] F.C.J. No. 756, *Waschuk Pipeline Construction Ltd.*, [1987] Alta L.R.B.R. 611, *Waschuk Pipeline Construction Ltd.*, [1988] A.J. No. 1232 (Alta Q.B.), *Canadian National Railway Company and Cape Breton and Central Nova Scotia Railway Limited*, (1994), 95 di 14 (CLRB), *Toronto Dominion Bank*, [1992] OLRB Rep. October 1123, and *Supply Chain Express Inc.*, [2001] OLRB Rep. November/December 1450 (Nov. 29, 2001).

51. I have read and carefully considered the cases and statutory materials provided by the parties. All of the cases and statutory materials were helpful in assisting me in reaching my decision. Not surprisingly, some of the cases and materials are more pertinent than others. Those cases and materials will be discussed below.

52. It is helpful to start the analysis with a review of the statutory context within which this proceeding is brought. As noted above, railways in Ontario are regulated both federally and provincially. Federally, the relevant legislation relating to the operation of railways is found in Part III of the *Canada Transportation Act* and in the *Railway Safety Act*. In this province, the pertinent legislation is the *Shortline Railways Act 1995*, which governs the licensing and operation of shortline railways in the province.

53. Section 87 of the *Canada Transportation Act* defines "railway" to mean "a railway within the legislative authority of Parliament", and specifically includes certain physical attributes and systems relating to the operation of a railway, such as its branches, extensions, sidings, rolling stock and equipment, as well as the communications or signalling systems used for railway purposes, and "other things connected with the railway". Section 87 of the *Canada Transportation Act* also defines "railway company" to mean a person who holds a certificate of fitness to construct or operate a railway that has been issued by the Canadian Transportation Agency. As a result, the *Canada Transportation Act* distinguishes between a railway on the one hand, and those entities that operate railways, on the other. This distinction is picked up by section 88(1) of the legislation, which states that Part III applies "to all persons, railway companies and railways within the legislative authority of Parliament". Section 88(2) of the *Canada Transportation Act* adds that Part III of the legislation applies to a railway, or portion of a railway, that is owned, controlled, leased or operated by a person who operates a railway within the legislative authority of Parliament. On its face, therefore, Part III of the *Canada Transportation Act* applies to the physical rail over which shortline railways operate.

54. The federal *Railway Safety Act* also has relevance to the operation of railways in the Province of Ontario. This legislation applies in respect of transport by railways to which Part III of the *Canada Transportation Act* applies, and its objectives include the promotion of safety of the public and personnel, and the protection of property and the environment, in the operation of railways. Part I of the *Railway Safety Act* provides that regulations may be made under the legislation respecting engineering standards governing the construction or alteration of railway works.

55. As noted above, shortline railways were established in Ontario (and in other provinces) as a response to decisions made by the CNR and the CPR in the early 1990's to discontinue the use of certain railway lines in the province. Shortline railway companies were created that were prepared to operate railcars on those railway lines to move freight. When the CNR and the CPR determined to lease its discontinued track to shortline railway companies, the provincial legislature enacted legislation that governed the operation of those shortline railways. The *Shortline Railways Act, 1995* was that legislation.

56. The *Shortline Railways Act, 1995* defines a "shortline railway" to mean a railway within the legislative jurisdiction of the Province of Ontario. A "railway" is defined to mean "a railway or any part of it", including its railway lines, equipment, real and personal property, "works connected with a railway", and any "structure and crossings used in the operation of a railway". A "railway line" is defined to mean "the land, structures and track on which a railway may be operated, and includes any part of it". Amongst other things, the *Shortline Railways Act, 1995* establishes a licencing scheme for the operation and potential discontinuance of operations of a shortline railway in Ontario, and provides that no person may construct or alter a shortline railway except in accordance with the regulations passed under the legislation. In addition, the *Shortline Railways Act, 1995* provides that the provincial Minister of Transportation may enter into agreements with the federal government or any federal regulatory authority concerning the administration of the legislation and the regulation of railway safety. Also of significance, section 16 of the *Shortline Railways Act, 1995* provides that, until revoked or amended, every decision, order, rule, regulation and direction made by the Canadian Transportation Agency in relation to road crossings and utility crossings continues to apply to those crossings even though those crossings may have passed from federal to provincial jurisdiction. It is evident from the materials filed with the Board by LIUNA that a number of agreements between shortline railways and the Ontario Minister of Transportation relating to the construction and maintenance of road crossings have been incorporated into orders made by the Canadian Transportation Agency.

57. It is on the basis of this legislative framework that counsel for Swift Railroad argued that the company's labour relations matters are properly governed by federal legislation. Counsel acknowledged during argument that there were certain "jurisprudential challenges" involved in the position taken by his client. In particular, counsel acknowledged that the onus was upon Swift Railroad to establish that it is an exception to the general rule that the provinces have exclusive jurisdiction over labour relations. He also acknowledged that the case authority clearly establishes that the labour relations of an employer cannot be provincially regulated on one day, and then federally regulated the next day – the assessment of constitutional jurisdiction must be made by reference to whether the operations of Swift Railroad are an integral element of a federally regulated business, with that assessment being made on an ongoing basis, at the macro level.

58. The position taken by Swift Railroad is premised on a number of grounds. Counsel noted that many of the cases cited by the parties involved construction employers that have unsuccessfully asserted federal jurisdiction because there was nothing particularly "federal" about the work it normally performed. Consistent with the observations by the Supreme Court that the constitutional jurisdiction of an employer's labour relations should not be determined by reference to the nature of the particular project worked upon when the issue became a live dispute, counsel acknowledged that the case law requires that the whole business operation of the employer be considered. Here, it is asserted that the circumstances are different than many of the cases cited by the union, because *all* of the work performed by Swift Railroad relates to rail. Swift Railroad is not a typical contractor,

because it performs a very highly specialized type of work with unique work characteristics, work that relates to rail. Notably, the type of work performed does not vary, no matter where the work is performed, or the identity of the client. The work always relates to rail. This, it was asserted, is enough to warrant the conclusion that Swift Railroad's labour relations is governed by federal labour legislation.

59. In addition, counsel distinguished the instant case from the cases relied upon by LIUNA by noting that a substantial majority of the work performed by Swift Railroad was performed on a rail line leased from either the CNR or the CPR, federally-regulated railways. After reviewing the legislative framework set out above, counsel asserted that because the lines upon which shortline railways operate are owned by federally-regulated railways, and governed by federally-established safety standards, and because Swift Railroad performs a substantial majority of its work on those lines, the conclusion must be reached that federal legislation governs the labour relations of the company.

60. Focusing upon the work performed by Swift Railroad on the Stamford subdivision in February, March and April, 2006, counsel noted that the company worked directly with VIA Rail, and that its employees took direction from a VIA Rail flagperson who was on site when the work was performed. The work was performed on the track itself, when the line was live, and a substantial amount of work performed by Swift Railroad was of this nature. The rail is the backbone of the system upon which the country's train service operates, and the work performed by Swift Railroad on the track rail is at the core of its business, and is not incidental to its operations. The business of Swift Railroad should, therefore, be considered to be integral to a federal work, undertaking or business. It was asserted that this combination of factors was sufficient to mandate the application of federal law to Swift Railroad.

61. Despite the very able argument made by counsel for the company, I am of the view that labour relations between Swift Railroad and its employees is governed by the provisions of the Act and not by those of the *Canada Labour Code*. I reach this conclusion for the reasons set out below.

62. In essence, Swift Railroad asserts that its labour relations is governed by the *Canada Labour Code* because all of the work that it performs is performed on rail that falls within federal jurisdiction – some of it perhaps leased from the CNR or the CPR - irrespective of where the rail is located or the identity of its client. The railway line is live and there is a flagperson from the CNR or the CPR present when the work is being performed, and the employees of Swift Railroad take direction from that flagperson. The railway line is the federal work or undertaking in relation to which Swift Railroad performs its work, a substantial amount of work by Swift Railroad is performed for either a federally-regulated railway or for shortline railways that operate on tracks leased from those same federally-regulated railways, and the work performed is not incidental to the operation of trains on the tracks, but is in fact integral to the operation of those rail lines.

63. In my view, there is nothing inherently "federal" about the fact that Swift Railroad provides a considerable amount of its business services to railways, because the vast majority of the services it has provided to railways have been provided to provincially-regulated shortline railways that are governed by the provisions of the *Shortline Railways Act, 1995*. The jurisprudence cited above (in particular, the Supreme Court of Canada decision in *United Transportation Union v. Central Western Railway Corporation*, [1990] 3 S.C.R. 1112) establishes that a railway that is not an interprovincial railway (and therefore is not a subject of federal jurisdiction under section 92(10)(a) of

the *Constitution Act, 1867* as a federal work or undertaking) and is not integral to an existing federal work or undertaking will be governed by provincial laws. Although the evidence established that during 2005 and 2006 Swift Railroad provided track rehabilitation services to the CNR (directly or indirectly, as the case may be), the vast majority of its services provided during the three years its services were reviewed in evidence were provided to clients other than federally-regulated railways.

64. The relative significance of the factors relied upon by Swift Railroad as pointing to federal regulation have been commented upon in many of the cases referred to during argument. In *Central Western Railway Corporation*, cited above, the fact that a local shortline railroad's tracks "touched" the federally-regulated rail line was insufficient to establish federal jurisdiction over that shortline railway, on the basis that to do so would effectively preclude a finding that any shortline railway was provincially-regulated, because rail lines in Canada form a continuous network across provincial and national boundaries. Similarly, merely because Swift Railroad performs work on rail that is ultimately owned by a federally-regulated railway operation cannot lead to the conclusion that Swift Railroad is federally-regulated, because to reach that conclusion would require that every business that operates on the rail lines be federally-regulated – and that cannot be the case.

65. One of the more helpful cases that speaks to some of the factors relied upon by Swift Railroad is *AXOR Construction Canada Inc.*, cited above. In that decision, a local of the Labourers' International Union of North America applied to the Board to represent a bargaining unit of construction labourers in the ICI sector of the construction industry in the Province of Ontario and all construction labourers in all other sectors of the construction industry in Board Area No. 15. A representation vote was conducted and a majority of those individuals in the bargaining unit casting ballots voted in favour of representation. After the taking of the vote, the employer challenged the Board's constitutional jurisdiction on the basis that the employees in question were governed by federal labour legislation.

66. The facts in *AXOR Construction* have some parallels to the facts of the instant case. In *AXOR Construction*, the employer was the general contractor in respect of a contract let by the National Capital Commission to rehabilitate and expand the Champlain Bridge, an interprovincial bridge that connects Ottawa, Ontario with Aylmer, Quebec, and spans the Ottawa River. There was no dispute that the bridge is a federal work. The contract required the employer to rehabilitate the bridge structure, and to construct a new bridge structure to be integrated with the existing bridge structure, using concrete girders. The bridge decking, roadways and recreational pathways were maintained in use during the course of construction, and the employer was responsible for maintaining traffic control on the bridge. The Champlain Bridge is supported by 33 piers anchored into the Ottawa River – with 17 of those piers being located in the Province of Quebec, and the remaining 16 piers being located in the Province of Ontario. Forty percent of the work was performed on the Quebec side of the bridge, and 60% of the work was performed on the Ontario side of the bridge. The construction labourers in question were working as flagmen, were installing bridge and construction signage, were performing cofferdam and foundation de-watering for the purpose of pier and abutment extensions, and assisted in the partial demolition of existing bridge piers. There was no dispute that the primary business of the employer was that of a general contractor.

67. The employer asserted that federal labour legislation applied to it on the basis that the bridge upon which the work was being performed was a federal work or undertaking. The employer highlighted the fact that the bridge remained in operation during its rehabilitation, and that it was

responsible for operating the bridge during the course of the project. The Board ultimately determined that the employer was governed by the Act rather than by the *Canada Labour Code*.

68. In its decision, the Board concluded that the fact that the bridge remained open and functional "[did] not merit the significance suggested by counsel". The Board noted that keeping the bridge open and functional was not equivalent to operating the bridge. Here, the same observation can be made. Swift Railroad has relied considerably upon the fact that the work it performs is at all relevant times performed on track that is live. But it is not at all clear that this is a meaningful fact. Swift Railroad does not operate the track when it performs the services it performs – it merely ensures that it is off the track in time to allow a train to pass, and that the portion of the track that it is working upon is sufficiently secure that the train can pass safely. Similar to the observation made by the Supreme Court in *Central Western Railway*, cited above, just about every piece of railway track in Ontario connects to some other piece of track that is being operated upon, and to that extent the track that is being worked upon is "live". During the course of testimony Mr. Swift asserted that some of the tracks that were worked upon for corporate clients were "live", even though the work was being performed on a siding. The fact that a track is "live" in this narrow way does not have the significance that the responding party asserts it does.

69. Other decisions have touched on some of the factors relied upon by Swift Railroad. A case of some assistance is *R.F. Welch British Columbia Limited*, cited above, a decision of the British Columbia Labour Relations Board. In *R.F. Welch*, the employer supplied work crews, catering services and equipment to the CNR on a cost plus basis, and had done so for more than 30 years. The employer provided its services exclusively to the CNR and engaged in no other business or operation. An application for certification was brought relating to employees involved in rock scaling, excavation, blasting and the maintenance, repair and replacement of existing track. The employees of the employer were brought to their daily work site by the CNR, which also provided the employer sleeper cars, a wash car, tool cars and a dining car. Work by the employees of the employer was carried out under the supervision of the Chief Engineer of the CNR. At all times the work was performed on the railroad right-of-way and properties of the CNR.

70. The B.C. Board considered the question of whether the work performed by employees of R.F. Welch was "vital", "essential", "necessarily incidental", "intimate" or "integral" to the operation of the CNR. The B.C. Board found that it was, noting that the employer was engaged in ongoing maintenance and clearing the railroad's right-of-way – distinguishing it from situations in which employees would be "performing a specific task for a fixed duration of time". The Board noted that the employees of R.F. Welch worked under the direct supervision of the CNR in the continuous servicing of track and clearing of the right-of-way, much of which work it characterized as "essential for the safe operation of the railway". The B.C. Board concluded that this activity was not a matter of convenience for the operation of the railway, but rather was "a vital and necessary aspect of the operation of the railway" – and therefore properly governed by federal labour law. Another factor that the B.C. Board considered was that the work of the employees was related exclusively to the CNR, and had been "intimately and inextricably connected with the CNR for many decades".

71. Counsel for Swift Railroad argued that this case supported his client's position that the services it provides are vital and integral to the operation of a federally-regulated railway. There are certain aspects of the *R.F. Welch* decision that do assist the company – the employees of Swift Railroad are supervised to a limited extent by the CNR flagperson who is responsible for ensuring that they are off the track when trains make their way through the area being worked on, which the

B.C. Board considered to be a factor in reaching the decision it did. Some of the other factors, however, do not assist the company.

72. As noted above, federal labour law will apply to a business operation if it is an integral, essential or vital element of a federally-regulated subject. It is difficult to conclude on the facts of this case that the services provided by Swift Railroad on the rail lines for its shortline railway clients, its corporate clients, or for the CNR and the CPR are an integral, essential or vital aspect of the operation of either the CNR or the CPR. Of critical importance is the fact that the operations of the shortline railways came into existence as a result of decisions made by the CNR and the CPR in the early 1990's to discontinue the use of the subdivisions of track upon which the shortline railways currently operate. That is, the CNR and the CPR were content to end all commercial activity on those portions of the railway lines upon which the various shortline railways referred to in testimony now operate. In that light, it is difficult to conclude that much of the work performed by Swift Railroad is vital, essential or integral to the operation of the CNR or the CPR, and that it is vital, essential or integral for the safe operation of either of those railway operators. The work performed by Swift Railroad is obviously important for the various shortline railway operators that use the subdivisions in question, but those shortline railway operators are provincially-regulated, not federally-regulated. While the work performed by Swift Railroad for the CNR in 2005 and 2006 on the Kingston and Stamford subdivisions, respectively, was on track operated by the CNR for the CNR itself, it is difficult to conclude based on two relatively short term contracts (one of which resulted in Swift Railroad providing services by way of a subcontract from Holland) that Swift Railroad has been "intimately and inextricably connected" with the CNR for an extended period of time, like the employer in *R.F. Welch*. In *R.F. Welch*, the employer had been providing services exclusively to the CNR for over 30 years at the time of the application for certification. Here, the facts disclose a short-term relationship with the CNR, at best. In the case of Swift Railroad, no such permanence, exclusivity or regularity is reflected by the relationship between it and the CNR. The intimate and inextricable relationship that was evident in *R.F. Welch* is absent from the relationship between the CNR and Swift Railroad.

73. For these reasons, I am of the view that the operations of Swift Railroad are not vital, essential or integral to the operation of the federally-regulated railway operations of the CNR and the CPR. In the absence of such a conclusion, the labour relations between Swift Railroad and its employees is governed by the provisions of the Act.

(b) On the application filing date, was the work performed by the employees of Swift Railroad work in the construction industry?

74. Once again, the parties were not in dispute regarding the relevant legal principles applicable to resolving this question. The answer to this question depends upon whether the work performed by the employees on the application filing date was in the nature of maintenance work (which would not be work in the construction industry) or repair work (which would be work in the construction industry). The union asserts that the work performed by the employees on the application filing date was work in the construction industry. The employer disagrees with that assertion.

75. Section 1(1) of the Act defines the term "construction industry" to mean "the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site". As a

result, if the work performed by Swift Railroad at the Stamford subdivision on the application filing date in Board File No. 4237-05-R consisted of constructing or repairing railway lines, the work in question falls within the definition of work performed in the construction industry. If the work performed on the application filing date is not repair work but work that is in the nature of maintenance, the work in question falls outside the definition of work performed in the construction industry. In the latter instance, the construction application for certification will be dismissed, and the industrial application for certification will continue.

76. The distinction between "repair" work and "maintenance" work has a long and somewhat tortured history at the Board. Both counsel agreed that the seminal case dealing with this distinction is *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. October 1477. In *Master Insulators'*, the Board distinguished between construction work and maintenance work in the following passages:

> 21. The distinction between "maintenance" and "repair" in the construction industry is not one which is easily made. While section 1(1)(f) of the Act defines "construction industry" and refers to "repairing", the words "maintenance" and "maintaining" do not appear in the Act. Several of the witnesses who appeared before the Board used the words "maintenance" and "repair" interchangeably. ...
>
> ...
>
> 28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility. However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134a(1) of the Act.
>
> 29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint, "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the

> functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

77. Counsel for Swift Railroad argued that based upon the analysis reflected by the Board in *Master Insulators'*, the key questions to be answered are "what is the system?" and, subsequently, "has that system ceased to function?". If the answer to the latter question is in the affirmative, then the work performed by the employees of the company is repair work, and therefore work in the construction industry for the purposes of the Act. If the answer to the latter question is in the negative, the work is maintenance work and outside the scope of work performed in the construction industry for the purposes of the Act.

78. Turning to the first question, counsel for the company noted that the "system" for the purposes of a rail line could be as small as an individual rail crossing, a length of rail, or even the bolts that hold rail together, which, if removed and replaced, could be characterized as "repair" for the purposes of the Act. However, the company asserts that a more realistic approach is to characterize the rail lines as a whole to be the "system" for the purposes of this question. Counsel noted that the company's clients operate on a continuous rail network, which could easily be characterized as the physical system for the purposes of this inquiry. He noted that on the Stamford subdivision the track was live when the work was completed, and that there was no evidence to suggest that the track ceased to function when the work was performed. Similarly, there was no evidence that replacement track was necessary, and there was no suggestion that the work done on that subdivision was effected in order to replace the entire system of track at the end of its functional life. The system only needed some improvements to be implemented, and it continued to function at all times while those improvements were being performed.

79. Counsel referred the Board to a number of decisions in support of his argument. In *Gallant Painting*, [1987] OLRB Rep. March 367, the responding party asserted that it was not an employer in the construction industry. The work in question was the painting of various platforms, railway cars, buildings, pipes, tanks and other containers and structures at certain petrochemical complexes. The painting was of existing structures that had been painted previously, and was intended to preserve and protect the structures from corrosion. The Board found that the work performed by the employees was not work in the construction industry, because it was of existing structures, done for the primary purpose of sustaining and protecting an operating system. Although the factual circumstances are considerably different than the instant case, counsel asserted that a parallel could be drawn – that the work performed by Swift Railroad was of an existing part of the rail line system for the primary purpose of sustaining and protecting it.

80. In a similar fashion, counsel for the company pointed to the decision of the Board in *Levert & Associates Contracting Inc.*, [1989] OLRB Rep. June 630. In that case, the employer was affixing four steel plates to a dissolving tank in the recovery and steam plant at a pulp and paper mill, and replacing a pipe that conducted vapour to an evaporator in that same plant. Tests previously carried out by the mill's owner had shown that some areas of the tank and pipe had become thin. The tank and pipe had previously been patched by employees of the mill. The employer operated its business right up to the annual shutdown when it had arranged for this work to be performed, in order

to reduce the risk of their failure while the mill was operating. Neither was leaking prior to the shutdown.

81. The question before the Board was whether the work performed by the employees was work in the construction industry. At paragraph 13 of the decision, the Board made the following observations:

> The facts here are clear. The dissolving tank and the vapour pipe were functioning fully immediately prior to the shutdown. But, because they both had developed thin areas, it was decided, in the case of the tank, to reinforce those areas and, in the case of the pipe, to replace it because that was more economical than patching or cutting out and replacing the thin areas. The work was not an addition to the recovery and steam plant and was not for the purpose of increasing its production capacity. It was work done for the purpose of avoiding having the tank or pipe fail while the mill was operating. Clearly, it was work which would assist in preserving the functioning of the recovery and steam plant and it was not work done for the purpose of restoring a system which had ceased to function or function economically.

Even though the pipe was replaced with new piping, the Board held that doing so was maintenance work and not construction work, because the work was effected to preserve the functioning of the system, and not to restore a system that had ceased to function. Counsel for Swift Railroad submitted that the same argument can be made with respect to the replacement of sperry rail in this proceeding. The rail that was replaced was part of a larger system. The system had not ceased to function. Nor was the installation of the new rail effected for the purpose of upgrading or adding capacity to the rail system. The work performed was intended to reduce the number of joints on the track, and therefore to lower the cost of maintenance in the future.

82. Finally, counsel for Swift Railroad directed the Board's attention to two construction industry grievance decisions involving the same employer. In *Blastco Corp.*, [2002] OLRD No. 3788 (Nov. 7, 2002) ("*Blastco No. 1*"), the applicant union alleged that the employer had violated a collective agreement by failing to use its members to perform the painting of both the interior and exterior of a water tower located on the Six Nations reserve. A report commissioned by the Six Nations suggested that it was not necessary for the interior of the tower to be painted at that time. Nonetheless, it was decided to paint both the interior and the exterior of the tower. Testimony before the Board suggested that a bit of rust had formed on the interior of the tank, but not much. The evidence also suggested that the vast majority of the coating on the exterior of the tower still held, although on certain parts of the tank the coating had almost completely worn off.

83. The employer asserted that the work that it performed on this tower was maintenance work, not construction work, and therefore not governed by the collective agreement. The Board identified the question before it as follows:

> 15. The question the Board must ask itself then is whether the repainting of the water tower at Oshweken preserved "the functioning of the system or part of a system" or whether the work was "necessary to restore a system or part of a system which has ceased to function or function economically". The interior and exterior coating on the water tower had not ceased to function. There was some damage to the exterior roof and to the access tunnel. A small amount of corrosion had started in the interior. However, the coating had not failed. It was

> advisable to repaint the exterior so that it would not fail in the future. It was also advisable to repaint the interior within seven years so that it would not fail. However, the coating on the water tower was still performing its function.

That is, the Board identified as the "system" the interior and exterior coatings on the water tower. Here, it concluded that the exterior coating as a whole was still functioning and did not have to be replaced, even though the paint on the roof may have come to the end of its life. The coating on the water tower had not yet failed, the water tower was not leaking or failing to perform its function, and the purpose of the work was to prolong the life of the coating, not to repair it. As a result, the Board found the work in question to be maintenance work, and dismissed the grievance.

84. Counsel for the company compared the above-noted decision with that of *Blastco Corp.*, [2003] OLRB Rep. July/August 535 (Aug. 19, 2003) ("*Blastco No. 2*"). In this decision, the same issue arose with respect to the recoating of a water tower in Napanee, Ontario. Reports previously provided to the local authority described the interior coating of the water tower as being "in fair to poor condition" and the exterior roof and tank coating as being "in fair condition". In 1998, a report recommended that the tank be recoated "within the next two to three years", and in 2001 a report recommended that the tank be coated "as soon as practical". The work was performed in 2002, one year later.

85. In the circumstances of *Blastco No. 2*, the Board concluded that the work fell within the definition of work in the "construction industry". The Board noted that the coating and therefore the tower had come to the end of its functional life, and that the municipal authorities had waited until the last possible time identified by the two inspection reports to replace the entire coating. The coating had ceased to perform its proper function, which is the protection of the steel tower. Even though the tower as a whole did not need to be replaced, it required a major overhaul that was more than just maintenance work. The Board concluded at paragraph 46 of its decision that the work was construction because "the work constituted the overall refurbishment or recreation of the tower as a functioning tank".

86. Applying both of the decisions summarized above to the facts of this proceeding, counsel for the company states that at the Stamford subdivision there was no work performed by Swift Railroad as a result of the rail lines ceasing to function. The rail lines had not been destroyed, as sometimes occurs when there is a derailment. Here, the railway line continued to be used every day by trains as the work was being performed. The rail system had not ceased to function. As a result, counsel urged the Board to conclude that the work performed by the employees at the Stamford subdivision is properly characterized as maintenance work, work outside of the construction industry.

87. Counsel for the union asserted that the context of the work at the Stamford subdivision can be taken from the wording of the contract that Swift Railroad signed with respect to the performance of the work. As noted above, the Rail Welding Service Contract between the CNR and Swift Railroad provided, in part, that Swift Railroad was to provide "turnkey" rail welding service at the Stamford subdivision. "Turnkey" is defined in the contract to mean "the scope of work required to *repair* identified rail *defects*" including "distribution and scrap pick-up services required as part of the *repair* welding process". Furthermore, the contract characterized the work performed by Swift Railroad as a "repair welding process". Counsel argued that the wording used by the parties should permit the Board to conclude that the parties to the contract considered the work to be repair work, and therefore properly characterized as construction work for the purposes of the Act.

88. Counsel noted that the reason for the work on the Stamford subdivision was to eliminate the number of joints and to maximize the amount of continuously-welded ribbon rail. The purpose of this work was to minimize future maintenance work for the CNR and to lower the risk of a catastrophic derailment. Having regard to the discussion of the Board in *Blastco No. 2* at paragraphs 27 and 28 (wherein it was noted that many of the Board's prior decisions "grapple with the issue of the boundary between a "system" on the one hand, and that which is merely a "component" of an operating system, on the other), counsel submitted that the Board's case law is difficult to apply with respect to a rail system that is static in nature, because by its very definition large static systems (such as railways, bridges and roads) do not normally go out of service when a repair is effected. In counsel's submission, it is not necessary for the entire road, bridge or railway line to collapse (and, in the case of a railway line, for a derailment to occur) before a repair can be effected. Using *Blastco No. 2*, as an example, counsel noted that even though the water tank continued to work, without leaks, the Board concluded that the work performed was nonetheless repair work that fell within the definition of work in the construction industry. Counsel highlighted that this decision supported the proposition that it is unnecessary for a disaster to occur before the work performed is considered construction work for the purposes of the Act. Put simply, repair work can be effected on a large, static system even though it continues to operate.

89. That is what the applicant asserts occurred here. In the instant case, the CNR knew that there were flaws in the rail, and contracted with Swift Railroad to have the situation remedied before a problem arose in the future. That work was repair work, and therefore construction work for the purpose of the Act. Counsel noted that a significant amount of rail work was performed by Swift Railroad on the Stamford subdivision – distinguishing the case from *Levert & Associates Contracting*, cited above, where the work performed was limited to work on four steel plates and a pipe.

90. Counsel for the union relied upon a number of other cases in support of his assertion that the work in question was work in the nature of repair. In *Keith Holdsworth Consulting Ltd.*, [1989] OLRB Rep. June 619, one of the major tasks performed by the employer was the sealing of cracks in underground parking garages. The employer argued that the work was in the nature of maintenance, but the Board concluded otherwise. The Board noted at paragraph 28 that fifty percent of the work involved the removal and replacement of an expansion joint and the waterproofing membrane of that joint, which work fell "squarely on the 'repair' side of the demarcation line between repair and maintenance". Counsel argued that joints and rail could be analysed in the same fashion – that each rail joint was a "system" in and of itself, and that the work was necessary to restore the system which had ceased to function economically. In *Delta Catalytic Industrial Services Ltd.*, [1997] OLRB Rep. November/December 979, the Board noted, at paragraph 26, that work that does not represent a significant addition to a facility or a system can still be construction work for the purposes of the Act. Counsel argued that the replacement of longer pieces of rail in lieu of shorter pieces (thereby resulting in fewer rail joints) was similar in nature to the replacement of the corrosion monitoring system and the compressor cooling system analysed by the Board at paragraphs 30 to 32, and 38 and 39 of that decision, respectively.

91. Three other cases of significance were relied upon by counsel for LIUNA during argument. In *Belmont Property Management Ltd.*, [1991] OLRB Rep. October 1117, the Board determined that work consisting of the re-surfacing of 35 percent of a parking garage was work in the construction industry. Large amounts of existing concrete were removed and replaced with new concrete in order to make that part of the garage operational and went beyond mere routine or simple

maintenance work. Counsel submitted that a parallel could be drawn to the rail replacement work performed by Swift Railroad for the CNR on the Stamford subdivision. In *Matrix Service Inc.*, [2004] OLRB Rep. July/August 742 (Aug. 31, 2004), the employees in question were performing work on a large crude oil tank that had "failed" a settlement test but remained usable and lawful to operate. The question before the Board was whether the work performed on the application filing date – welding together steel plates that made up the tank's annular ring – was construction work. The Board held that it was, noting that although the tank had not failed in the sense that it could not be used to store crude oil or was leaking, it was evident that the tank would reach that stage sooner than anticipated if something was not done. The work that was ultimately carried out – constructing a differently designed tank, which involved the building of extensive concrete foundations and a new annular ring upon which the tank shell rested – was a redesign and re-building of the tank, construction work.

92. Finally, the applicant relied upon the Board's decision in *Norjohn Contracting and Paving*, [2004] OLRD No. 3602 (April 7, 2004). In that case, the question before the Board was whether one individual performed the duties of an operating engineer for a majority of his working day on the application filing date. For the purposes of this case, the relevance of the decision lies with the fact that the parties agreed that the work being performed on the application filing date was work in the construction industry. The work performed that day consisted of repairing a road – shovelling broken asphalt out of areas to be patched, patching the areas in question and rolling the fresh asphalt. Counsel for the applicant drew a parallel to the work performed by employees of Swift Railroad on the track – the road remained in use, and will serve its function better. If this work is construction work, counsel submitted that so should the resurfacing of railway track.

93. In reply, counsel for the company asserted that it is irrelevant that the company made reference to "construction" in advertisements or in the materials produced for VIA Rail. He stated that individuals who make reference to "construction" work in those contexts do so without reference to the Act in mind. Counsel also noted that the prior case law is not always clear as to why one result is chosen over the other. Counsel submitted that it is difficult to rationalize the case law on a principled basis. As a result, he urged the Board to return to the test, accepted for decades, stemming from the *Master Insulators'* decision.

94. With respect to the applicant's argument that it ought not to be required that a catastrophe occur before work on railway lines can be characterized as "construction", counsel for the company countered that not all failure of a railway line is necessarily catastrophic. The line can cease to work functionally, or even economically. With respect to the analogy raised by the *Norjohn Contracting* decision, cited above, counsel submitted that although there is a superficial similarity, when looked at more critically the similarity disappears. Counsel submitted that there are different "systems" involved in road building – asphalt and drainage, for example – which, if they fail, can be removed and replaced – that is, "repaired". However, counsel asserted that filling a pothole with asphalt would not be construction – because that work is not reflective of a failure of a system, but only that there is a defect. It has to be fixed – but to do so is not construction work. Counsel for Swift Railroad asserts that the appropriate parallel to be drawn in this case with respect to road upkeep is with work filling potholes and cracks on a road. There is no suggestion that the rail system had failed, or that the entire track had failed, was at the end of its working life, and had to be replaced. The rail, like the road, had not failed, so it did not need to be completely rehabilitated. Someone identified the spots that needed fixing – within the next six months - and those spots were fixed by a roving crew, in the normal course. The line, like the road, was live, but specific areas of the road were not. Counsel for the

company submitted that on the applicant's theory, all work would be construction work, because any defect that requires welding or cutting of the track would be a "repair".

95. Finally, with respect to the applicant's reliance upon the decision of the Board in *Matrix Service Inc.*, cited above, counsel for the company asserted that no principled distinctions were identified in the decision – that the Board did not identify the "systems" at play, and merely "eyeballed" things without analyzing the situation in accordance with the case law. Counsel asserted that the Board must have concluded that because the design of the "system" had to be altered, it must be "construction". Counsel noted that the basic system on the Stamford subdivision had not changed at all as a result of the work performed by Swift Railroad. Counsel stated that if the law is applied as described by *Master Insulators'*, the work performed on the application filing date was simply maintenance work.

96. For the reasons set out below, I am of the view that the work performed by the employees of Swift Railroad on the application filing date was maintenance work, and not work in the construction industry.

97. The distinction between maintenance work, on the one hand, and repair work, on the other, can be extremely thin at the best of times. In this particular proceeding, both parties made credible arguments based on Board jurisprudence for the positions they take, and it has been difficult to assess whether the work performed by employees of Swift Railroad on the application filing date fell beyond the line that demarcates maintenance work from construction work. After considering all of the evidence and argument of the parties, the conclusion I reach is that the work performed on the relevant date did not cross that line.

98. I start from the proposition that the reasoning of the Board in *Master Insulators'* remains persuasive and is the starting point from which this determination should be made. In *Master Insulators'*, the Board identified as the hallmark of maintenance work those tasks that "sustained and maintained" a facility and enabled it to "operate efficiently" or to "attain its designed or production capacity". Construction work, on the other hand, involved "the addition to an existing facility" or was work that "will increase the designed or production capacity [illegible] an existing facility". The Board stated that the distinction was dependent upon the context of [illegible] given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work in question "assists in preserving the functioning of a system or part of a system", the work is maintenance work.

99. The work performed by Swift Railroad on the Stamford subdivision in 2006 consisted of joint elimination and repair welding. A portion of the rail on the Stamford Subdivision already consisted of ribbon rail. To the extent the rail was not ribbon rail, Swift Railroad was tasked with the responsibility of eliminating any joints and making those sections of track into ribbon rail.

100. In my view, the railway tracks are an existing "system" that is utilized by trains to travel from one point to another. The work performed by the employees of the company on the application filing date was not the result of an emergency, but well-planned maintenance by the CNR to minimize the risk of future derailment or the weakening of the track (and the rolling stock). That is, Swift Railroad was contractually tasked with assisting the CNR in preserving the functioning of part of the track system. The evidence of Mr. Swift was that weaknesses in the rails were identified by the CNR and marked for replacement within the next six months after discovery. None of the work performed

by Swift Railroad on the Stamford subdivision was an emergency; none of it was required to be done immediately.

101. Viewed as a whole, the work performed by Swift Railroad for the CNR on the Stamford subdivision falls on the maintenance side of the dividing line between maintenance and repair. The track system had not ceased to function at the time of that the work was performed. Nor was the work performed to upgrade or add capacity to the rail system. Although the work performed was not unnecessary - in the sense that it would have to be done eventually - the track was not at the end of its functional life at the time the work was completed. The full extent of the work performed by Swift Railroad was in large measure triggered by the desire of the CNR to make sections of the track into ribbon rail – work that would lower the cost of maintenance in the future. That work was proactive and not required to be done in 2006, when performed by Swift Railroad. In that context, a number of the cases relied upon by the union for its position can be distinguished.

102. As a result, I am of the view that on the application filing date the work performed by the employees of Swift Railroad was not work in the construction industry as defined by the Act.

(c) Assuming that the answer to the first question is that the Act governs labour relations matters between Swift Railroad and its employees, is Swift Railroad a "non-construction employer" for the purposes of the Act?

103. For the purposes of the construction industry provisions of the Act, a "non-construction employer" is defined by subsection 126(1) of the Act to mean:

> an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person.

104. Counsel for Swift Railroad acknowledged during the course of argument that his client clearly expects compensation from unrelated persons for the work it performs. Although counsel also acknowledged that some of the work performed by Swift Railroad before January 1, 2006 was indisputably construction work, he submitted that the assessment of whether Swift Railroad was or was not a "non-construction employer" should be made on a seasonal basis only – that is, by reference to the evidence before the Board regarding the activities of the company after January 1, 2006. From the time period of January 1, 2006 to the application filing dates, counsel submitted that the evidence before the Board establishes that Swift Railroad performed "no work" in the construction industry, because the only work performed by Swift Railroad during that time period was the work performed for the CNR on the Stamford Subdivision, and two discrete sales of ties and spikes. On this basis, counsel for the company asked the Board to declare Swift Railroad to be a non-construction employer for the purposes of the Act.

105. Counsel for the union, relying upon the decision of the Board in *Alcan Inc.*, [2003] OLRD No. 2497 (July 17, 2003), submitted that the window for considering whether any given employer is a non-construction employer should extend for a three year period immediately prior to the application date in the proceeding in which the employer's status is raised. If that window is adopted, there is no dispute that Swift Railroad is not a non-construction employer for the purposes of the Act. Counsel for the union also referred during the course of argument to *Waterloo Catholic District School Board*, [2005] OLRD No. 1715 (April 21, 2005), and *Greater Essex County District School Board*, [2003] OLRB Rep. January/February 74 (Jan. 22, 2003).

106. In reply argument, counsel for Swift Railroad disputed the theory relied upon by the union for the submission that a three year period is appropriate, arguing that in the absence of a collective agreement the utilization of a three year period is fictional. He submitted that there ought to be no bright line test applicable to every case, and submitted that if it is definitive on the day before the application that the employer is or will be a "non-construction employer" in the future, that should be sufficient for a declaration.

107. In my view, it is unnecessary to resolve this disagreement between the parties. It is not evident to me that this question is a true issue in the context of these proceedings. I have concluded that the work performed by the employees on the application filing date is not work in the construction industry as defined by the Act. As a result, whether Swift Railroad was at any time or is a non-construction employer for the purposes of the Act has no relevance to either of these proceedings. The question of whether an entity is a non-construction employer for the purposes of the Act is triggered by an application brought to the Board by an employer pursuant to section 127.2 of the Act. Any application brought under that section of the Act is clearly premised upon the existence of a collective bargaining relationship between a union and the alleged non-construction employer at the time of the application.

108. There is no such relationship in existence between these two parties in this proceeding. As a result, there is no apparent reason to resolve this question and I therefore decline to do so.

Disposition

109. For the reasons set out above, I determine that:

(a) labour relations between Swift Railroad and its employees is governed by the Act;

(b) on the application filing date the work performed by the employees of Swift Railroad was not work in the construction industry; and

(c) it is unnecessary to determine whether Swift Railroad is a "non-construction employer" for the purposes of the Act.

110. As a result of the above-referenced determinations, Board File No. 4237-05-R, the application for certification in the construction industry, is dismissed. Board File No. 0139-06-R will continue.

111. The parties are directed to consult with each other regarding the resolution of all outstanding issues. Counsel for the union is to advise the Registrar how the parties propose to deal with the outstanding issues.

112. I will remain seized with this proceeding.

COURT PROCEEDINGS

2127-05-G; 3437-05-G (Court File No. 66/08) International Brotherhood of Electrical Workers, Local 353 v. **Jacobs Catalytic Industrial Services Limited**, General Presidents' Maintenance Committee for Canada, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, and Ontario Labour Relations Board

Construction Industry Grievance – Estoppel – Judicial Review – The IBEW sought judicial review of a Board ruling that dismissed two grievances that alleged that certain work was construction and not maintenance, and had accordingly been performed under the General Presidents' Maintenance Agreement as opposed to the provincial ICI agreement – The Board had found that the union's representative had agreed that the impugned projects would be conducted as maintenance, so the IBEW was estopped from claiming relief for the work the Board found to be construction – On judicial review, the Court found the Board's decision was within the range of reasonableness – Application dismissed

Board decision reported at: [2008] OLRB Rep. November/December 1043

Superior Court of Justice (Divisional Court), Jennings, Swinton and Low JJ., January 29, 2009

JENNINGS J.: (Orally)

[1] This is an application for judicial review of a decision of the Ontario Labour Relations Board, dated November 29, 2007 dismissing grievances by the Union.

[2] The Union grieved that work done and paid for as maintenance under the General Presidents' Maintenance Agreement ("GPMA") was actually construction, which as such was covered at a higher pay scale and should have been performed under the industry-wide Principal Agreement between the Union and the bargaining agency of the Electrical Contractors Association of Ontario.

[3] The Board found that the work done was part maintenance and part construction. Regardless, the Board was unanimous in its decision that the Union was estopped from relying on its rights under the Principal Agreement because the Union's business agent had agreed with the respondent's representative that the work would be done under the GPMA.

[4] Before us, the Union submitted that the Board's decision ignored the effect of s.162 of the *Labour Relations Act* which provides that there shall be only one provincial agreement between employer and employee bargaining agencies and that "... any collective agreement or other arrangement that does not comply with subsection (1) is null and void".

[5] The Union submits that the arrangement between its business agent and the respondent's representative was an impermissible attempt to avoid the Principal Agreement.

[6] The parties agree that the standard of review is reasonableness.

[7] In its analysis of the issue of estoppel the Board accepted that generally the doctrine cannot apply against the application of the *Labour Relations Act* itself, particularly when public policy considerations are at issue (see Reasons, para. 89).

[8] However, the Board's finding properly construed was not that there was a parallel collective agreement or other arrangement existing contrary to the scheme of the *Labour Relations Act* and in particular s.162, but only that the Union is estopped from claiming damages in the specific circumstances that are present here.

[9] We do not accept the Union's submission that the Board ignored the provisions of s.162. To the contrary, we find that the Board conducted a purposive analysis of s.162. None of the mischiefs that s.162 addresses were found to be present. The Board found no public policy considerations in play.

[10] Having so found, the Board applied the doctrine of estoppel, not to allow a contracting out of the Provincial Agreement, but that because of the reliance by the respondent on the representations made to it " … it would be unjust or unconscionable to allow the Union to enforce the strict terms of the Principal Agreement". (Reasons, para. 106).

[11] We find that conclusion to be within the range of reasonableness. It determines an issue squarely within the Board's expertise and experience.

[12] Accordingly, the application for judicial review will be dismissed.

COSTS

[13] I endorse the Record: "Application is dismissed for oral reasons delivered today. Costs fixed by agreement at $4,000, payable to each of the respondents, Jacobs and GPM Committee".

2153-01-OH (Court File No. 461/08) Mohamed C.Z. Khan v. Royal Alliance and Ontario Labour Relations Board

Health and Safety – Judicial Review - Practice and Procedure – The applicant sought review of a Board decision dismissing his complaint under s. 50 of the *Occupational Health and Safety Act* – The Court found the Board's original decision and its disposition of the applicant's multiple reconsideration requests were eminently reasonable – Further, the Board's ruling on the applicant's adjournment request following opening statements was also a reasonable exercise of the Board's discretion – In addition, the applicant failed to explain his six-year delay in filing the application for judicial review – Application dismissed

Board decision not reported

Superior Court of Justice (Divisional Court), Jennings, Bellamy and Little JJ., January 21, 2009

ENDORSEMENT

THE COURT:

[1] The applicant brings this application for judicial review of a decision of the Ontario Labour Relations Board (the Board) dated September 17, 2002, in which the Board dismissed a complaint of an unlawful reprisal pursuant to its authority under the *Occupational Health & Safety Act,* R.S.O. 1990, c.O.1, s.50 (the OHSA). The applicant asks that the Board be held accountable for perverting the course of justice, and seeks $2.5 million relief from the respondent Royal Alliance for violating the OHSA. The application for judicial review was filed on September 12, 2008, nearly six years after the Board's decision dismissing the applicant's complaint.

[2] In its September 17th decision, the Board found that the applicant had not raised any health and safety concerns regarding dangerous working conditions in the workplace, and that he had not been fired, but instead had resigned from the workplace.

[3] The applicant brought a request for reconsideration of the Board's decision. The Board found that the reconsideration of this matter was not appropriate as there was no new information, no obvious error had been made, and the request did not raise significant and important policy issues which had not been given adequate attention or consideration. On March 3, 2003, the Board confirmed the earlier decision of September 17, 2002.

[4] On March 18, 2003, the applicant brought another request for reconsideration. As it appeared to raise the same concerns in the earlier request for reconsideration, on March 24, 2003, the Board decided that it was not prepared to exercise its discretion to reconsider either decision.

[5] On April 2, 2003, the applicant again sought a reconsideration, raising the same grounds, plus an additional one. On April 11, 2003, the Board again refused to exercise its discretion to reconsider saying that "It raises no issue that would normally merit the exercise of that discretion in the applicant's favour, and it merely repeats, albeit with amplification, the previous position of the applicant."

[6] On April 24, 2003 and May 9, 2003, the applicant again sought a reconsideration either of the Board's decision dismissing the initial application or of one or more of the three subsequent decisions in which the Board declined to exercise its jurisdiction to reconsider the first decision. This time, when none of the applicant's filings had raised any new material, the Board concluded as follows:

> 1. The Board's resources ought not to be utilized in such a fashion.
>
> 2. For these reasons, the Board will no longer accept any further reconsideration applications from the applicant regarding Board File No. 2153-01-OH.

[7] Almost six years later, the applicant seeks to judicially review these decisions.

[8] Before the Supreme Court of Canada's decision in *Dunsmuir v New Brunswick,* [2008] S.C.J. No. 9, decisions of the Ontario Labour Relations Board had been reviewed on a patent

unreasonableness standard: *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, et al.*, (2008) 91 O.R. (3d) 20 (Div.Ct.). That standard of review has been eliminated by *Dunsmuir*. Counsel for the responding parties agreed that Board decisions are now to be reviewed on the reasonableness standard. Decisions under s.50 of the *Occupational Health & Safety Act* were reviewed on a patent unreasonableness standard before *Dunsmuir*: *Rooke v. Ontario (Labour Relations Board)* 2006 CanLII 23945 (ON S.C.D.C.), (2006), 214 O.A.C. 175 (Div.Ct.).

[9] We conclude that the appropriate standard of review with respect to decisions of the Ontario Labour Relations Board under s.50 of the *Occupational Health & Safety Act* is one of reasonableness.

[10] It is for the applicant to show that the Board's decisions and reconsiderations were unreasonable. He has not satisfied that onus. The Board's decision of September 17, 2002 was eminently reasonable, as were the reconsideration decisions.

[11] The strongest argument advanced by the applicant was that he was denied natural justice because the Board refused to grant him an adjournment on the hearing date. At the start of the hearing, both parties had made opening statements, after which the Board provided directions to the parties. In the course of those directions, the Board member informed the parties that he would not permit the applicant to lead evidence of settlement discussions that had taken place prior to the hearing. At this point, the applicant sought an adjournment to obtain legal counsel. In its reasons at paragraph 5, the Board noted "The reason given for his request was not clear, but it had to do with the Board's ruling prohibiting evidence of the settlement discussions."

[12] The respondent, Royal Alliance, strongly resisted this motion for an adjournment on the basis that it had gone to considerable time and expense to bring its witnesses to the hearing and, in any event, the applicant had made a deliberate and conscious decision to represent himself.

[13] The Board denied the motion because the applicant had failed to provide any compelling justification for his late request. Further, two separate Board documents which had been sent to the applicant much earlier "clearly informed him of his right to be represented by legal counsel. He had ample time to make the necessary arrangements." The alleged reprisal had occurred twenty months earlier.

[14] The Board has the authority to control its own process and has the discretion to grant or refuse an adjournment. A party to a hearing under s. 50 of the *OHSA* is not required to have legal representation. Here, the applicant had twice been advised well in advance of the hearing that he could have legal representation if he so chose. On the hearing date, he appeared without counsel and was ready to proceed. Indeed, he made an opening statement. It was only after hearing that he could not introduce discussions with respect to settlement that he asked for an adjournment to obtain a lawyer. In our view, the Board's decision to deny the adjournment was a reasonable exercise of its discretion and we will not interfere with it.

[15] Judicial review is an equitable and discretionary remedy. There is an obligation on the applicant to bring the matter to the Divisional Court without undue delay. The applicant has not given us reason why we should exercise our discretion to hear this judicial review after such an unexplained lengthy delay.

[16] The application is dismissed. No costs being demanded by either respondent, there will be no costs awarded.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 2008

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0212-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Zzen Group of Companies Limited, Zzen Homes Limited, Zzen Developments Limited and, Zzen Design Build Limited (Respondents)

Unit: "all construction labourers in the employ of Zzen Group of Companies Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Zzen Group of Companies Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0692-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Cinjo Interiors Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Cinjo Interiors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and foreman all painters and painters' apprentices in the employ of Cinjo Interiors Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) *(Clarity Note)*

1377-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 2071438 Ontario Limited o/a Complete Trax (Respondent)

Unit: "all construction labourers in the employ of 2071438 Ontario Limited o/a Complete Trax in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario,and all construction labourers in the employ of 2071438 Ontario Limited o/a Complete Trax in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2109-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Aromi Contracting Corporation, Aromi FX Inc., 1100261 Ontario Inc. o/a Aromi Group and/or, 800838 Ontario Inc. (Respondents)

Unit: "all painters and painters' apprentices in the employ of Aromi Contracting Corporation, Aromi FX Inc., 1100261 Ontario Inc. o/a Aromi Group and 800838 Ontario Inc., in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

2265-08-R: IBEW Construction Council of Ontario (Applicant) v. Pro Trades Mechanical Inc. (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Pro Trades Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Pro Trades Mechanical Inc. in all sectors of the construction industry in the Counties of Essex and Kent and in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2602-08-R: IBEW Construction Council of Ontario (Applicant) v. 618605 Ontario Inc. c.o.b. as Ambassador Electric (Respondent) v. Construction Workers Local 53, affiliated With Christian Labour Association of Canada (Intervener)

Unit: "all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 618605 Ontario Inc. c.o.b. as Ambassador Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians, electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 618605 Ontario Inc. c.o.b. as Ambassador Electric in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2621-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. David Leon Bell carrying on business as Universal Scaffold Services (Respondent)

Unit: "all carpenters and carpenters' apprentices employed by David Leon Bell carrying on business as Universal Scaffold Services in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

2682-08-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ryan James Orr o/a Orrco Lighting & Electrical (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Ryan James Orr o/a Orrco Lighting & Electrical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Ryan James Orr o/a Orrco Lighting & Electrical in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2726-08-R: IBEW Construction Council of Ontario (Applicant) v. 1473456 Ontario Limited, c.o.b. as Lear Electric (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 1473456 Ontario Limited, c.o.b. as Lear Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of 1473456 Ontario Limited, c.o.b. as Lear Electric in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2784-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Stephen Lewis o/a Lewis Electric (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Stephen Lewis /a Lewis Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Stephen Lewis o/a Lewis Electric in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

2806-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Pol-Bec Electrique Inc. (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Pol-Bec Electrique Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Pol-Bec Electrique Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1547-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pharmx Rexall Drug Stores Ltd. (Respondent)

Unit: "all employees of Pharmx Rexall Drug Stores Ltd., at its retail stores in the Regional Municipalities of Niagara and Peel and the City of Hamilton, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Graduate and Undergraduate Pharmacists, including Pharmacy interns and Apprentice Pharmacists, and Office Staff and those employees employed at non-retail Pharmacy clinics" (89 employees in unit)

Number of names of persons on revised voters' list	138
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	63
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	6

1621-08-R: Canadian Union of Public Employees (Applicant) v. Sodexo Canada Limited (Respondent) v. Labourers International Union of North America, Local 837 (Intervener)

Unit: "all housekeeping employees employed by Sodexo Canada Limited at the Juravinski Cancer Centre, 699 Concession Street, in the City of Hamilton, Ontario, save and except supervisors and those above the rank of supervisor" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	7
Number of ballots segregated and not counted	0

1819-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pharmx Rexall Drug Stores Ltd. (Respondent)

Unit: "all employees of Pharmx Rexall Drug Stores Ltd., at its retail stores in the Regional Municipalities of Niagara and Peel and the City of Hamilton, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Graduate and Undergraduate Pharmacists, including Pharmacy interns and Apprentice Pharmacists, and Office Staff and those employees employed at non-retail Pharmacy clinics" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	138
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	6

2349-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Pharmx Rexall Drug Stores Ltd. (Respondent)

Unit: "all employees of Pharmx Rexall Drug Stores Ltd., at its retail stores in the Regional Municipalities of Niagara and Peel and the City of Hamilton, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Graduate and Undergraduate Pharmacists, including Pharmacy interns and Apprentice Pharmacists, and Office Staff and those employees employed at non-retail Pharmacy clinics" (22 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	138
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	6

2439-08-R: Ontario Nurses' Association (Applicant) v. Lakeside Long-Term Care Centre (Respondent)

Unit: "all registered nurses and nurses with temporary certificate of registration employed in a nursing capacity by Lakeside Long-Term Care Centre, Toronto, save and except Assistant Director of Care and persons above the rank of the Assistant Director of Care" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

2482-08-R: Canadian Union of Public Employees (Applicant) v. Northeastern Catholic District School Board (Respondent)

Unit: "all persons employed in the position of child and youth worker by the Northeastern Catholic District School Board in the District of Cochrane and Temiskaming, save and except supervisors, persons above the rank of supervisor, students employed in a co-op capacity or during vacation periods, lunchroom attendants, pastoral care workers and persons for whom a trade union holds bargaining rights as of November 13, 2008" (9 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

2495-08-R: Ontario Public Service Employees Union (Applicant) v. Canadian Mental Health Association - Cochrane Temiskaming Branch (Respondent)

Unit: "all employees of Canadian Mental Health Association - Cochrane Temiskaming Branch in the District of Cochrane, Temiskaming and the City of Temiskaming Shores, save and except program managers and persons above the rank of program managers, information technologists and executive, human resources, accounting, payroll/accounting team leads and financial assistants" (113 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	100
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	81
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	36
Number of ballots segregated and not counted	1

2644-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Jarvis-George Housing Co-Operative Inc. (Respondent)

Unit: "all employees of Jarvis-George Housing Co-Operative Inc. employed at 279 Jarvis Street, in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2677-08-R: Teamsters Local Union No. 879 (Applicant) v. Health Care Services Group Inc. (Respondent)

Unit: "all employees of Healthcare Services Group Inc. working at 6861 Oakwood Drive, Niagara Falls, Ontario, Canada, save and except supervisors and those above the rank of supervisor" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

2752-08-R: Canadian Union of Public Employees (Applicant) v. Student Federation of the University of Ottawa / Fédération étudiante de l'Université d'Ottawa (Respondent)

Unit: "all employees of the Student Federation of the University of Ottawa in the City of Ottawa, save and except managers and persons above the rank of manager/ supervisors and persons above the rank of supervisor" (143 employees in unit)

Number of names of persons on revised voters' list	147
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	7

Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	9

2755-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent)

Unit: "all employees of Apollo 8 Maintenance Services Limited employed at or out of 2 Bloor Street East in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (28 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2773-08-R: UNITE HERE (Applicant) v. Niagara 21st Group Inc., c.o.b. as Courtyard Marriott (Respondent)

Unit: "all employees of Niagara 21st Group Inc., c.o.b. as the Courtyard by Marriott, at its 5950 Victoria Avenue, in the City of Niagara Falls, Ontario location, save and except supervisors, those above the rank of supervisor, human resources staff, accounting staff, information technology staff, front desk staff, receiving staff, courier staff, administrative staff and restaurant and kitchen employees, including all employees employed at TGI Fridays, the Keg and the Café" (32 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	54
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	4

Applications for Certification Dismissed Subsequent to Vote

1798-07-R: Public Service Alliance of Canada (Applicant) v. The University of Western Ontario (Respondent)

Unit: "all registered graduate students of the University of Western Ontario in the City of London regularly employed as Research Assistants for not more than twenty-four (24) hours per week, save and except Graduate Research Assistants, students of the Richard Ivey School of Business, supervisors and persons above the rank of supervisor. Clarity Note #1: the term GRADUATE RESEARCH ASSISTANTS refers to those individuals covered by the certification application in OLRB File No. 0413-06-R. *Clarity Note* #2: Graduate Teaching Assistants who are covered by the subsisting collective agreement between the Public Service Alliance of Canada and the University of Western Ontario and in addition who are also regularly employed as Research Assistants for not more than twenty-four (24) hours per week are included in the bargaining unit." (78 employees in unit) *(Clarity Note)*

1167-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. St. Hilda's Towers Inc. (Respondent)

Unit: "all employees of St. Hilda's Towers Inc. employed at 2339 Dufferin Street and 800 Vaughan Road, in the City of Toronto performing personal service work, maintenance, housekeeping and janitorial work, save and except supervisors, registered nurses, office staff, foremen, and persons above the rank of foremen and supervisor." (60 employees in unit)

1622-08-R: Canadian Union of Public Employees (Applicant) v. Sodexo Canada Limited (Respondent) v. Labourers International Union of North America, Local 837 (Intervener)

Unit: "all employees employed by Sodexo MS Canada Limited at Hamilton Health Sciences in the City of Hamilton, Ontario, save and except those as of Oct. 11, 2005 are covered by a collective bargaining agreement, supervisors, those above the rank of supervisors and office staff" (68 employees in unit)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	32
Number of ballots segregated and not counted	2

1711-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 1540822 Ontario Inc. o/a Trax Unlimited, 2071438 Ontario Limited o/a Complete Trax, Complete Excavating Limited (Respondents)

Unit: "all employees of 1540822 Ontario Inc. o/a Trax Unlimited, and/or 2071438 Ontario Limited o/a Complete Trax, and/or Complete Excavating Limited working in and out of the Province of Ontario, save and except office and clerical staff, sales staff, supervisors and persons above the rank of supervisor" (3 employees in unit)

2494-08-R: U.F.C.W. Local 333 (Applicant) v. InnVest Hotels GP IV Ltd. o/a North York Comfort Inn (Respondent)

Unit: "all Front Desk Staff including night auditors employed by InnVest Hotels GP IV Ltd. o/a North York Comfort Inn located at 66 Norfinch Drive, North York, Ontario, save and except office, clerical and sales staff, accounting staff, room checker staff and security officers, housekeeping staff, housemen and maintenance, students employed during the school vacation period, supervisors and persons above the rank of supervisor." (5 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2524-08-R: Canadian Union of Public Employees (Applicant) v. Community Care East York (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Intervener)

Unit: "all employees employed of Community Care East York in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical, paramedical employees, program co-ordinators, program assistants, drivers and program workers." (75 employees in unit)

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	29
Number of ballots segregated and not counted	0

2585-08-R: Public Service Alliance of Canada (Applicant) v. Queen's University at Kingston (Respondent)

Unit: "all persons registered as graduate students at and who are employed by Queen's University, in the City of Kingston, as Teaching Assistants or Teaching Fellows, save and except supervisors and persons above the rank of supervisor, employees for whom a trade union held bargaining rights on November 20, 2008, persons who hold appointments to the Academic Staff of the University as defined by the University's Statement on Adjunct Academic Staff and Academic Assistants, persons who hold appointments to the General Support Staff or Research Staff of the University, full voting members of the Board of Trustees, and members of the legal or medical profession employed in their professional capacity" (1500 employees in unit)

Number of names of persons on revised voters' list	1324
Number of persons who cast ballots	709
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	709
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	187
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	359
Number of ballots marked against applicant	398
Number of ballots segregated and not counted	148

2595-08-R: Labourers' International Union of North America, Local 247 (Applicant) v. Robinson Solutions (Kingston) Inc. (Respondent)

Unit: "all employees of the responding party at the Lafarge Bath Cement Plant, 6501 Bath Road (Hwy 33), Bath, Ontario, save and except supervisors, persons above the rank of supervisor, and office, clerical and sales employees" (16 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

1252-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Mine Tech Inc. (Respondent)

0743-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jeda Rose Management Inc. (Respondent)

0884-08-R: Teamsters Local Union No. 419 (Applicant) v. Nord Gear Ltd. (Respondent)

2589-08-R International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Aromi Contracting Corporation, Aromi Fx Inc., 1100261 Ontario Inc. o/a Aromi Group and/or 800838 Ontario Inc. (Respondent)

2742-08-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Barrie Concrete Forming Inc. and/or Barrie Concrete Forming and Floors Inc. (Respondent)

2852-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Built-Con Contracting Limited (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2358-04-R: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Lafarge Canada Inc., R & M Transit Mix Services, Roxy Construction Co. Limited, A. Tarzwell Holdings Limited and Bulk Transfer Systems Inc. (Respondents) *(Withdrawn)*

2299-06-R: Brick and Allied Craft Union of Canada, Local 31, Brick and Allied Craft Union of Canada, Ontario Provincial Conference of International Union of Bricklayers and Allied Craftworkers (Applicants) v. York Marble, Tile & Terrazzo Inc., Capital Stoneworks Inc., York Fabrica Inc. (Respondents) *(Withdrawn)*

3412-07-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. 675606 Ontario Limited, c.o.b. as Specific Utility Contractors and, 1614818 Ontario Inc., c.o.b. as Postma Concrete Forming (Respondents) *(Withdrawn)*

0742-08-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc., Jeda Rose Management Inc. (Respondents) *(Withdrawn)*

0966-08-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners f America (Applicant) v. Snobs Fashions Ltd. and, Corr Millwork Co. Ltd. (Respondents) *Withdrawn)*

1505-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 2071438 Ontario Inc. o/a Complete Trax, 1540822 Ontario Inc. o/a Trax Unlimited, Complete Excavating Limited (Respondents) *(Withdrawn)*

1592-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. A.C. Concrete Forming Ltd. and, JAC Concrete Structures and Drain Inc. (Respondents) *(Withdrawn)*

2038-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Pro Line Carpenters Limited and/or, Proline Construction & Carpenters Ltd. and/or, Proline Construction Ltd. and/or, Mainforce Construction Ltd. (Respondents) *(Granted)*

2096-08-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. M-C Interiors Inc., Douglas McFadden and, Douglas McFadden o/a Greg Interiors (anunincorporated and unregistered business name) (Respondents) *(Withdrawn)*

2138-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kobul Interiors, Marlen Inc. (Respondents) *(Endorsed Settlement)*

2251-08-R: Labourers' International Union of North America, Local 837 (Applicant) v. Fama Construction Ltd., Fama Construction Limited (1999) Ltd. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

3232-Y3-R: Ontario Public Service Employees Union (Applicant) v. Kingston General Hospital; (Respondent) *(Dismissed)*

2358-04-R: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Lafarge Canada Inc., R & M Transit Mix Services, Roxy Construction Co. Limited, A. Tarzwell Holdings Limited and, Bulk Transfer Systems Inc. (Respondents) *(Withdrawn)*

2299-06-R: Brick and Allied Craft Union of Canada, Local 31, Brick and Allied Craft Union of Canada, Ontario Provincial Conference of International Union of Bricklayers and Allied Craftworkers (Applicants) v. York Marble, Tile & Terrazzo Inc., Capital Stoneworks Inc., York Fabrica Inc. (Respondents) *(Withdrawn)*

0742-08-R: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc., Jeda Rose Management Inc. (Respondents) *(Withdrawn)*

0966-08-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Snobs Fashions Ltd. and Corr Millwork Co. Ltd. (Respondents) *(Withdrawn)*

1316-08-R: Labourers' International Union of North America, Local 493 (Applicant) v. J.D.S. Investments Limited and Vista Sudbury Hotel Inc. (Respondent) *(Withdrawn)*

1592-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. A.C. Concrete Forming Ltd. and, JAC Concrete Structures and Drain Inc. (Respondents) *(Withdrawn)*

2038-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Pro Line Carpenters Limited and/or, Proline Construction & Carpenters Ltd. and/or Poline Construction Ltd. and/or, Mainforce Construction Ltd. (Respondents) *(Granted)*

2096-08-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v M-C Interiors Inc., Douglas McFadden and, Douglas McFadden o/a Greg Interiors (an unincorporated and unregistered business name) (Respondents) *(Withdrawn)*

2138-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Kobul Interiors, Marlen Inc. (Respondents) *(Endorsed Settlement)*

2251-08-R: Labourers' International Union of North America, Local 837 (Applicant) v. Fama Construction Ltd., Fama Construction Limited (1999) Ltd. (Respondents) *(Withdrawn)*

2589-08-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Aromi Contracting Corporation, Aromi FX Inc., 1100261 Ontario Inc. o/a Aromi Group and/or, 800838 Ontario Inc. (Respondents) *(Terminated)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1028-07-R: Jeff Heaton (Applicant) v. Universal Workers Union, Labourers International Union of North America, Local 183 (Respondent) v. A-1 Hydrant Services Ltd., Greater Toronto Sewer and Watermain Contractors Association (Interveners) *(Withdrawn)*

Unit: "all employees employed by A-1 Hydrant Services Ltd. in and out of the City of Toronto, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff and all construction labourers in the employ of A-1 Hydrant Services Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (26 employees in unit)

1260-08-R: CUPE Members, Local 4619 (Applicant) v. CUPE Local 4619 (Respondent) v. South Asian Family Support Services (Intervener) *(Dismissed)*

Unit: "Employees of the South Asian Family Support Services including their LINC Centres in the City of Toronto, save and except Executive Director, Accountant/Bookkeeper, LINC Program Manager, Administrative Assistants, temporary and casual Employees. Any new positions in which an Employee exercises managerial or confidential functions, within the meaning of the Ontario Labour Relations Act, are also excluded from this bargaining unit" (55 employees in unit)

Number of names of persons on revised voters' list	57
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	51
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

2455-08-R: Dean Funston (Applicant) v. Service Employees International Union Local 2.on, Brewery, General & Professional Workers' Union (Respondent) *(Granted)*

Unit: "all bottling and general labourers, brewing, filtering and retail store employees of Steelback Brewery Inc. in the County of Bruce, Province of Ontario, save and except office, sales, quality control employees and supervisors, quality control manager, brewery manager and person above the rank of supervisor." (15 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3
Number of ballots segregated and not counted	0

2460-08-R: Carmen Teti Christine Krentiris Jasbir Soos Jennifer Westover and Peter Ho(Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Steelworkers") Local 9042-65 (Respondent) *(Granted)*

Unit: "all office, clerical and technical employees at Mississauga, Ontario, save and except Manager, Assistant Manager, persons above the rank of Assistant Manager and Steno/Receptionist." (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

2515-08-R: Kathy Peister (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Fairyland Retirement Village Ltd. c.o.b. as Golden Pond Retirement Residence (Intervener) *(Granted)*

Unit: "all employees of Fairyland Retirement Village Ltd. c.o.b. as Golden Pond Retirement Residence, save and except Managers, persons above the rank of Manager, salesman, office and clerical staff." (6 employees in unit)

2521-08-R: Non Management Employees of Links2Care (Applicant) v. CUPE (Canadian Union of Public Employees) Local 4854 (Respondent) v. Links2Care (Intervener) *(Granted)*

Unit: "all employees of Links2Care in the Regional Municipality of Halton, save and except supervisors, persons holding the position of Coordinator 1, persons above the rank of supervisor and Coordinator 1 and students employed during the school year." (83 employees in unit)

Number of names of persons on revised voters' list	83
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	30
Number of ballots segregated and not counted	0

2672-08-R: Shawn Roe (Applicant) v. Graphic Communications International Union, Local 100-M (formerly Graphic Communication International Union Local 100-M) (Respondent) *(Dismissed)*

Unit: "all employees of Atlantic Packaging Products Ltd.'s Corrugated Division located at 195 Walker Drive, Brampton, Ontario L6T 3Z9, save and except foremen, persons above the rank of foreman, office staff and sales staff." (110 employees in unit)

Number of names of persons on revised voters' list	114
Number of persons who cast ballots	114
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	107
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	94
Number of ballots marked against respondent	20
Number of ballots segregated and not counted	0

2774-08-R: Sivananthan Sanjeevan on behalf of the employees of Fairfield Inn & Suites by Marriott Toronto Airport (Applicant) v. United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Respondent) v. Easton's Toronto Airport Hotel (Caroga) L.P. o/a Fairfield Inn and Suites by Marriott (Intervener) *(Dismissed)*

2821-08-R: Dean Dickieson (Applicant) v. United Food and Commercial Workers International Union, Local 1000A (Respondent) v. Nexcycle Plastics Inc. (Logistics Facility) (Intervener) *(Dismissed)*

2823-08-R: Dean Dickieson (Applicant) v. United Food and Commercial Workers International Union, Local 1000A (Respondent) *(Dismissed)*

2828-08-R: Sivananthan Sanjeevan on behalf of the employees of Fairfield Inn & Suites by Marriott Toronto Airport (Applicant) v. United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Respondent) v. Easton's Toronto Airport Hotel (Caroga) L.P. o/a Fairfield Inn and Suites by Marriott (Intervener) *(Withdrawn)*

2843-08-R: Debbie Burke, Marg Hartwig and Laurie Stickle (Applicant) v. Canadian Union of Allied Employees (Respondent) v. Dr. Garry Solomon (Intervener) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0249-06-U: Tony Tuzi (Applicant) v. Woodbine Entertainment Group Inc. (Respondent) *(Terminated)*

2525-06-U: International Union of Operating Engineers, Local 793 (Applicant) v. Lafarge Canada Inc. (Respondent) *(Withdrawn)*

0659-07-U: Janet Rumleski (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. MICS Group of Health Services (Intervener) *(Dismissed)*

0664-07-U: Vijaya Kumar Mallanagouda (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Local 504 (Respondent) v. Burlington Technologies Inc. (Intervener) *(Dismissed)*

1176-07-U: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. A-1 Hydrant Services Ltd. (Respondent) v. Greater Toronto Sewer and Watermain Contractors Association (Intervener) *(Withdrawn)*

1516-07-U: William Panay (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondent) v. Ganotec-Mason, A Partnership (Intervener) *(Dismissed)*

1815-07-U: Teamsters Local Union 230 (Applicant) v. Lafarge Canada Inc. (Respondent) *(Withdrawn)*

2309-07-U: Violet Boulam (Applicant) v. OPSEU, Local 593 (Respondent) v. The Clarendon Foundation (Cheshire Homes) Inc. (Intervener) *(Dismissed)*

3867-07-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent) *(Withdrawn)*

3912-07-U: Canadian Union of Public Employees and it Local 1156 (Applicant) v. Toronto Rehabilitation Institute (Respondent) *(Withdrawn)*

0100-08-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent) *(Withdrawn)*

0114-08-U: Universal Workers Union, L.I.U.N.A., Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent) *(Withdrawn)*

0373-08-U: International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041, Recouvrement Métalliques Bussières Ltée and, Pomerleau Inc. (Respondents) *(Dismissed)*

0420-08-U: Danny Steve Joseph Smith (Applicant) v. CAW-Canada Local 127 (Respondent) v. Daymond Aluminum (Intervener) *(Withdrawn)*

0423-08-U: Dan Szabo #1862 (Applicant) v. Thompson Products Employees' Association (Respondent) *(Withdrawn)*

0444-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent) *(Withdrawn)*

0892-08-U: Universal Workers Union, L.I.U.N.A., Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent) *(Withdrawn)*

1048-08-U: Jamesway Construction Corporation (Applicant) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Dismissed)*

1064-08-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Dan Blackburn o/a Mr. Electric (Respondent) *(Withdrawn)*

1187-08-U: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Endorsed Settlement)*

1231-08-U: Michael Genier, Dave Ferguson, Bill Bouck (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 462 (Respondent) *(Dismissed)*

1274-08-U: Ontario Public Service Employees Union (Applicant) v. Elizabeth Fry Society of Toronto (Respondent) *(Withdrawn)*

1318-08-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Lennox Canada Inc. cob as Service Experts Francis Home Environment (Respondent) *(Withdrawn)*

1407-08-U: Teamsters Local Union No. 419 (Applicant) v. Nord Gear Ltd. (Respondent) *(Endorsed Settlement)*

1562-08-U: Henryk Kotyra (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) v. Biltrite Industries (Intervener) *(Withdrawn)*

1563-08-U: Cancoil Thermal Corporation (Applicant) v. United Food and Commercial Workers Local 175 (Respondent) *(Dismissed)*

1699-08-U: Gordon Craig (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondent) *(Withdrawn)*

1724-08-U: Mohammad Alam Doll (Applicant) v. UNITE HERE Local 75 (Respondent) *(Withdrawn)*

1725-08-U: Narusafa Maniruzzaman (Applicant) v. UNITE HERE Local 75 (Respondent) *(Withdrawn)*

1773-08-U: Mark Sears (Applicant) v. Big Bears Drivers Association (Respondent) *(Withdrawn)*

1864-08-U: Olivio Obad (Applicant) v. ACCO Brands Canada Inc. (Respondent) v. Communications, Energy and Paperworkers Union of Canada, Local 320 (Intervener) *(Dismissed)*

2053-08-U: Nadine Thompson (Applicant) v. SEIU Local 1.On (Respondent) *(Withdrawn)*

2209-08-U: Joshua Stafford (Applicant) v. SEIU Local 2 Brewery, General and Professional Workers' Union (Respondent) *(Withdrawn)*

2329-08-U: Rose Cordeiro (Applicant) v. CUPE Local 3501 (Respondent) *(Withdrawn)*

2367-08-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. Algoma Energy L.P. and Dan Hedley (Respondent) *(Withdrawn)*

2383-08-U: Don Tonge (Applicant) v. United Food and Commercial Workers (UFCW) (Respondent) *(Withdrawn)*

2428-08-U: IBEW Construction Council of Ontario (Applicant) v. Pro Trades Mechanical Inc. (Respondent) *(Withdrawn)*

2440-08-U: Ron W. Greven (Applicant) v. Michael Hillhouse a Director of 2082984 Ontario Inc. o/a Paesano's Bakery and Deli (Respondent) *(Withdrawn)*

2461-08-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Iron Mountain Canada Corporation (Respondent) *(Withdrawn)*

2490-08-U: Martin Benoit (Applicant) v. Teamsters Local 91 (Respondent) *(Withdrawn)*

2561-08-U: UNITE HERE IU Employees in Ontario: Baer, Nadia; Bakhazi, Kamal; Bayon, Melisa; Fueser, JJ; Hardy, Ashley; Hollin, Marc; Lue, Valrie; Neatby, Stu; Warsame, Guled; Yerex, Jay; Zerehi, Sima (Applicant) v. Federation of Union Representatives (FOUR) (Respondent) *(Dismissed)*

2572-08-U: Nidal Zeiti (Applicant) v. CAW Canada - Local 1688 (Respondent) *(Withdrawn)*

2578-08-U: Carolyn Sousa (Applicant) v. Niagara Detention Centre, B. McDonnell, B. McTrach, A. Gronski (Respondents) *(Dismissed)*

2678-08-U: International Union of Operating Engineers, Local 793 (Applicant) v. JBL Construction, (A Division of 1644472 Ontario Limited) (Respondent) *(Granted)*

2754-08-U: Raj Shahi (Applicant) v. Steel Worker's Union - District 6 - Local 9466 (Respondent) *(Terminated)*

2849-08-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Superior Boiler Works and Welding Limited (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2523-08-M: Native Child and Family Services of Toronto (Applicant) v. Communications, Energy and Paperworkers Union of Canada (Respondent) *(Withdrawn)*

2729-08-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v.Starsky Foods Inc. (Respondent) *(Withdrawn)*

2743-08-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Cornerstone Structural Restoration Inc. (Respondent) *(Granted)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION

2489-08-M: Le Conseil scolaire de district du Grand Nord de l'Ontario (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2525-08-M: Highrise Windows Technologies (Applicant) v. United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Respondent) *(Granted)*

2533-08-M: Keewatin-Patricia District School Board (Applicant) v. Canadian Union of Public Employees and its Local 1939 (Respondent) *(Granted)*

2562-08-M: Le Conseil Scolaire de District Catholique des Aurores Boreales (Applicant) v. Service Employees International Union Local 2.on, Brewery, General & Professional Workers' Union (Respondent) *(Granted)*

2570-08-M: Le Conseil scolaire de district catholique Franco-Nord (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2584-08-M: York Region District School Board (Applicant) v. Canadian Union of Public Employees Local 1734 (Respondent) *(Granted)*

2591-08-M: Le Conseil scolaire de district catholique Centre-Sud (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2592-08-M: Flex-N-Gate Seeburn a Division of Ventra Group Co. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union Local 9403 (Respondent) *(Granted)*

2632-08-M: Rainbow District School Board (Applicant) v. Ontario Secondary School Teachers' Federation Professional Student Services Personnel Branch (Respondent) *(Granted)*

2633-08-M: Rainbow District School Board (Applicant) v. Ontario Secondary School Teachers' Federation Education Support Staff Unit (Respondent) *(Granted)*

2640-08-M: Le Conseil des écoles séparées catholiques de Dubreuilville (Applicant) v. L'Association des Enseignantes et des Enseignants franco-ontariens (Respondent) *(Granted)*

2642-08-M: Le Conseil scolaire de district du Nord-Est de l'Ontario (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2698-08-M: Le Conseil scolaire de district du Grand-Nord de l'Ontario (Applicant) v. La Fédération des enseignantes et des enseignants des écoles secondaires de l'Ontario, unité locale 57 (Respondent) *(Granted)*

2701-08-M: The Hamilton-Wentworth District School Board (Applicant) v. Ontario Secondary School Teachers Federation - Office, Clerical and Technical Bargaining Unit - District 21 (Respondent) *(Granted)*

2703-08-M: Le Conseil scolaire de district catholique de l'Est ontarien (Applicant) v. L'Association des enseignantes et enseignants franco-ontariens-membres du personnel enseignant suppléant qualifié (Respondent) *(Granted)*

2707-08-M: Le Conseil scolaire catholique du Nouvel-Ontario (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2714-08-M: Le Conseil scolaire de district catholique de l'Est ontarien (Applicant) v. Syndicat canadien de la fonction publique et sa section locale 4155 (Respondent) *(Granted)*

2725-08-M: Le Conseil scolaire de district catholique de l'Est ontarien (Applicant) v. La Fédération des enseignantes-enseignants des écoles secondaires de l'Ontario (FEESO) représentant le personnel de soutien en éducation - Unité 65, District 33 (Respondent) *(Granted)*

2727-08-M: Le Conseil scolaire de district des écoles catholiques du Sud-Ouest (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2733-08-M: Le Conseil scolaire catholique de district du Nouvel-Ontario (Applicant) v. La Fédération des enseignantes et enseignants des écoles secondaires de l'Ontario (FEÉSO) Unité 61 du District 31 (Respondent) *(Granted)*

2734-08-M: Simcoe County District School Board (Applicant) v. Instructors' Bargaining Unit OSSTF District 17 - Simcoe (Respondent) *(Granted)*

2736-08-M: Conseil des écoles catholiques de langue française du Centre-Est (Applicant) v. Syndicat canadien de la fonction publique et sa section locale 4297 (Respondent) *(Granted)*

2739-08-M: The Hamilton-Wentworth District School Board (Applicant) v. Ontario Secondary School Teachers Federation - Professional Student Services Personnel Bargaining Unit - District 21 (Respondent) *(Granted)*

2792-08-M: Le Conseil scolaire catholique de district des Grandes Rivières (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

2225-07-JD: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041 (Applicant) v. Recouvrement Métalliques Bussières Ltée, Pomerleau Inc., International Union of Painters and Allied Trades, Local Union 200 (Respondents) *(Dismissed)*

0293-08-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. Crossby Dewar and International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondents) *(Dismissed)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3578-07-OH: Douglas Burleigh (Applicant) v. Unison Engine Components Orillia (Respondent) *(Withdrawn)*

1220-08-OH: John Maniex, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and Local 7135 (Applicant) v. National Steel Car Limited (Respondent) *(Withdrawn)*

1626-08-OH: Bruce A. Price (Applicant) v. Gardiners Tire Sales and Service (Respondent) *(Withdrawn)*

2197-08-OH: Stan Oleszczyk (Applicant) v. Tractel Ltd. Swingstage Division (Respondent) *(Dismissed)*

CONSTRUCTION INDUSTRY GRIEVANCES

1179-07-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. A-1 Hydrant Services Ltd. (Respondent) v. Greater Toronto Sewer and Watermain Contractors Association (Intervener) *(Withdrawn)*

1973-07-G: International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Pomerleau Inc. (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 2041 (Intervenor) *(Endorsed Settlement)*

2629-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Withdrawn)*

2630-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Withdrawn)*

2631-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Withdrawn)*

2632-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Withdrawn)*

2633-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bousada Interiors Inc. (Respondent) *(Withdrawn)*

0635-08-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. E. S. Fox Ltd. (Respondent) *(Granted)*

0744-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Derbtile Construction Inc., Jeda Rose Management Inc. (Respondents) *(Withdrawn)*

0967-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Corr Millwork Co. Ltd. (Respondent) *(Withdrawn)*

0968-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Snobs Fashions Ltd. (Respondent) *(Withdrawn)*

1531-08-G: Brick and Allied Craft Union of Canada, Local 31 (Applicant) v. York Marble Tile & Terrazzo Inc. (Respondent) *(Withdrawn)*

1950-08-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v.Pinnacle Comfort Inc. (Respondent) *(Granted)*

1954-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Regal Electricians Inc. (Respondent) *(Granted)*

2139-08-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marlen Inc. (Respondent) *(Withdrawn)*

2284-08-G: Sheet Metal Workers International Association, Local 47 (Applicant) v. Ottawa Single Ply Roofing (Respondent) *(Withdrawn)*

2323-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Ritz Metal 2000 Inc. (Respondent) *(Withdrawn)*

2366-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. Anmar Mechanical & Electrical Contractors Ltd. (Respondent) *(Withdrawn)*

2406-08-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Amlap Corporation Inc.(Respondent) *(Withdrawn)*

2450-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Quantum Remediation, a Division of Quantum Murray LP (Respondent) *(Withdrawn)*

2466-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. D & D Metal Erectors (Respondent) *(Withdrawn)*

2467-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local 721 (Applicant) v. AMF All Metal Fabricating Ltd. (Respondent) *(Granted)*

2471-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local 736 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Withdrawn)*

2480-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. C.A.P. Concrete Structures Ltd. (Respondent) *(Withdrawn)*

2551-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Randy F. Thompson c.o.b. Triassic Construction Services (Respondent) *(Granted)*

2552-08-G: Labourers' International Union of North America, Local 837 (Applicant) v. E-Zee Forming Ltd. (Respondent) *(Withdrawn)*

2593-08-G: Universal Workers' Union, L.I.U.N.A., Local 183 (Applicant) v. Accurate Railroad Construction Limited (Respondent) *(Granted)*

2594-08-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant)v. Paul Carcone c.o.b. as Ability Glazing Contractors (Respondent) (*Granted)*

2597-08-G: The International Brotherhood of Painters and Allied Trades, Local Union 1819 (Applicant) v. Caliber Glass Industry Inc. (Respondent) *(Granted)*

2599-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Da Silva c.o.b. as JD Installations/JD Cold Rooms (Respondent) *(Granted)*

2600-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. R. Baun Construction Inc. (Respondent) *(Granted)*

2607-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. B&B Millwork Inc. (Respondent) (Granted)

2618-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Randy F. Thompson c.o.b. Triassic Construction Services (Respondent) *(Granted)*

2619-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rocan Construction Ltd. (Respondent) *(Granted)*

2634-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. 894882 Ontario Inc. o/a Gordon Enterprises (Respondent) *(Granted)*

2657-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Formcrete Structural Ltd. (Respondent) *(Granted)*

2658-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Ltd. (Respondent) *(Granted)*

2661-08-G: Labourers' International Union of North America, Local 625 (Applicant) v. Ontario Paving & General Contracting (Respondent) *(Withdrawn)*

2664-08-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Global Architectural Contracting Inc. (Respondent) *(Granted)*

2699-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mid-Canada Construction Corp. (Respondent) *(Granted)*

2700-08-G: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Applicant) v. 618605 Ontario Inc. c.o.b. as Ambassador Electric Inc. (Respondent) *(Withdrawn)*

2735-08-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Expertcom Construction Inc. (Respondent) *(Granted)*

2763-08-G: The International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Middlesex Drywall Ltd.; Niekohr Holdings Inc. (Respondent) *(Granted)*

2764-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Terragon Landscaping Ltd. (Respondent) *(Withdrawn)*

2765-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Terragon Landscaping Ltd. (Respondent) *(Withdrawn)*

2786-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946,Local 2222, Local 2486 (hereinafter referred to as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Interior Technologies Ltd. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

4334-04-ES: Ryan Benson (Applicant) v. 1210321 Ontario Inc. o/a Sunoco Gas Bar, Director of Employment Standards (Respondents) *(Dismissed)*

0601-06-ES: Edward E. Spence A Director of Sentinel Security Network Inc. (Applicant) v. Jessica Williams, Director of Employment Standards (Respondents) *(Dismissed)*

2700-06-ES: Yellow Self Storage Ltd. (Applicant) v. Lynn McKay and Director of Employment Standard (Respondents) *(Terminated)*

1064-07-ES: Ashok Kalra (Applicant) v. Mr. Topper's Pizza Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

1666-07-ES: Hasan Hashmi (Applicant) v. Hav A Nap Motel and Director of Employment Standards (Respondents) *(Granted)*

1992-07-ES: Casselman Tire Inc. (Applicant) v. Paul Lavoie and, Director of Employment Standards (Respondents) *(Dismissed)*

2167-07-ES: Leisure Days Inc o/a Leisure Days RV Centre (Applicant) v. David Divell and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3094-07-ES: Nabil Kassis (Applicant) v. 2076503 Ontario Limited o/a Clarion Resort Pinewwod Park, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3099-07-ES: Royal Comfort Ltd. (Applicant) v. Dong Qing Jin and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3434-07-ES: 175382 Canada Inc. o/a Hillary's Cleaners (Applicant) v. Dianne Moore and, Director of Employment Standards (Respondents) *(Granted)*

0096-08-ES: Stefan Tarvids (Applicant) v. General Motors of Canada Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

0315-08-ES: Ali M. Saleh (Applicant) v. G4S Security Services (Canada) Ltd./G4S Services De Securite (Canada) Ltee. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0430-08-ES: Smart Systems For Health Agency (Applicant) v. Donald McMurdie and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0741-08-ES: Canwood Fashion Group Inc. (Applicant) v. Shun Wah Lam and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0955-08-ES: 1363814 Ontario Limited o/a Waubaushene Truck Stop (Applicant) v. Debbie Latondress and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1026-08-ES: 154644 Canada Inc. o/a Seniors for Seniors (Applicant) v. Ann Cruickshank and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1102-08-ES: Martha Avendano (Applicant) v. Quinterra Property Maintenance Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1528-08-ES: B.G. Schickedanz (York) Inc. c.o.b. as The Royal Canadian Riding Academy (Applicant) v. Sabrina Welter and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1739-08-ES: Greg W.F.T. Bandy (Applicant) v. Sears Canada Inc., and, Director of Employment Standards (Respondents) *(Withdrawn)*

1748-08-ES: CTS Canadian Career College Inc. (Applicant) v. Jessie St. Pierre and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1790-08-ES: Dominic Gagnon (Applicant) v. Clear Springs Golf Course Limited, Director of Employment Standards (Respondents) *(Withdrawn)*

1933-08-ES: Gurmeet Singh Grewal, director of 1591327 Ontario Inc. o/a City Wide Dry Cleaners (Applicant) v. Paramjeet Khokhar and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1982-08-ES: Central Printers (Sudbury) Ltd. (Applicant) v. Keith Hallikainen and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2094-08-ES: Durham Hino Truck & Equipment Inc. (Applicant) v. Barry Holt and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2117-08-ES: Seun Olowolafe (Applicant) v. UPS and, Director of Employment Standards (Respondents) *(Dismissed)*

2121-08-ES: Fibre Laminations Ltd. (Applicant) v. Riccardo Mason and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2247-08-ES: Marek Dyla (Applicant) v. Deluxe Freight Services Ltd. and, Director of Employment Standards (Respondents) *(Withdrawn)*

2260-08-ES: 2076795 Ontario Inc. o/a Canadian Tire Gas Bar and Andrity Fedorenko (Applicant) v. Andrew Downey and, Director of Employment Standards (Respondents) *(Dismissed)*

2277-08-ES: Uthayarajah Gunarajah (Applicant) v. Windsor Arms Hotel and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2291-08-ES: Dempsey Enterprises Ltd. o/a Shoeless Joe's Maple (Applicant) v. Nicholas Gouvis and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2296-08-ES: Mini-Skool 'A Child's Place' Inc. (Applicant) v. Taryn Nurse and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2378-08-ES: Aida Donaldson (Applicant) v. Sunrise Seniors Place (Oshawa-Durham) Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2579-08-ES: Sukhjit Dogra (Applicant) v. 1412190 Ontario Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

2580-08-ES: 911887 Ontario Limited o/a Datatek Systems (Applicant) v. David Minty and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2581-08-ES: Abravani & Petgar Seniors House, Inc. c.o.b. Shaya Retirement Home (Applicant) v. Parisa Ali-Abadi and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2639-08-ES: Daniel Loyer (Applicant) v. Manitex Lift King and, Director of Employment Standards (Respondents) *(Terminated)*

2645-08-ES; 2646-08-ES; 2647-08-ES; 2648-08-ES; 2649-08-ES; 2650-08-ES; 2651-08-ES: Tom Schnarr, a Director of 6497667 Inc o/a The Thirsty Toad (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

2667-08-ES: Gemma Communications Corporation (Applicant) v. Catherine Salka and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2761-08-ES: Helen Rebolo (Applicant) v. Streamline Marketing and, Director of Employment Standards (Respondents) *(Terminated)*

2816-08-ES: Maralee Di Giuseppe (Applicant) v. Medallion Fence Limited and, Director of Employment Standards (Respondents) *(Withdrawn)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1372-07-HS: Toronto District School Board (Applicant) v. Elementary Teachers Federation of Ontario and, R. Robert Sinson, Inspector (Respondents) *(Withdrawn)*

2642-07-HS; 2643-07-HS: Dumas Contracting Ltd. (Applicant) v. Patrick Vaillancourt (Respondent) *(Endorsed Settlement)*

1007-08-HS: Canadian Union of Public Employees Local 543 (Applicant) v. Corporation of the City of Windsor and, Richard Taggart, Inspector (Respondents) *(Withdrawn)*

1351-08-HS: XS Cargo Ltd. (Applicant) v. Ministry of Labour (Respondent) *(Withdrawn)*

1450-08-HS: Waterford Sand & Gravel (Applicant) v. Rick Shulist, Inspector (Respondent) *(Withdrawn)*

2132-08-HS: Ayman Khattar (Applicant) v. Laurie Wheeler, Inspector (Respondent) *(Withdrawn)*

2345-08-HS: Dynamic Properties Inc. (Applicant) v. Rick Carpenter and, Josie Roque, Dave MacDonald, Inspector (Respondents) *(Withdrawn)*

APPLICATION UNDER THE AMBULANCE SERVICES COLLECTIVE BARGAINING ACT

1873-08-M: The Corporation of the County of Frontenac (Applicant) v. Ontario Public Service Employees Union and its Local 462 (Respondent) *(Withdrawn)*

CECBA - EMPLOYEE STATUS

2475-08-M: The Crown in Right of Ontario (Applicant) v. The Ontario Public Service Employees Union (Respondent) *(Withdrawn)*

FIRST AGREEMENT - DIRECTION

1164-Y3-FC: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Lafarge Canada Inc. (Respondent) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

1008-08-PS: Ontario Public Service Employees Union (Applicant) v. The Eastern Ontario Regional Laboratory Association ("EORLA"), The Canadian Union of Public Employees ("CUPE"),, Sixteen Hospitals in the Champlain Local Health Integrated Network (Appendix A)("16 Hospitals") (Respondents) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1812-06-PE: Call-A-Service Inc./Harmony Hall Centre for Seniors (Applicant) v. Anonymous Complainant c/o Case Coordinator, Pay Equity Commission (Respondent) *(Granted)*

0842-07-U: Keith Leveque (Applicant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Black Smiths, Forgers and Helpers, Local 494D (Respondent) v. Lafarge Canada Inc. (Intervener) *(Dismissed)*

2101-07-ES: Robert McLaughlin (Applicant) v. Graphite Specialty Products Inc. and/or Ferns Golf & Country Club and, Director of Employment Standards (Respondents) *(Dismissed)*

2787-07-ES: Dmitri Kondramachine (Applicant) v. Solution Q Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3341-07-ES: Guillaume Dionne Blanchet (Applicant) v. 6459595 Canada Inc. o/a Cera-Wood and,Director of Employment Standards (Respondents) *(Dismissed)*

0387-08-HS: Steven Mroczynski (Applicant) v. Castonguay Blasting GP and, Claude Nadon, Inspector (Respondents) *(Dismissed)*

1140-08-PE: Kirk Windibank (Applicant) v. Corporation of the City of Windsor (Respondent) *(Dismissed)*

1366-08-HS: Barrie Welding & Machine (1974) Ltd. (Applicant) v. Byron MacDonald, Mike Waechter and, Adrian David, Inspector (Respondents) *(Dismissed)*

2528-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Jose Pires c.o.b. as La Vitesse Drywall & Taping (Respondent) *(Granted)*

CASE LISTINGS JANUARY 2009

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1232-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Nor Eng Construction & Engineering Inc. (Respondent)

Unit: "all construction labourers in the employ of Nor Eng Construction & Engineering Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (3 employees in unit)

3684-07-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Kieswetter Demolition Inc., Kieswetter Demolition (1992) Inc., Timeless Timber Structures Inc., TheTimeless Material Company Inc. (Respondents)

Unit: "all construction labourers in the employ of Kieswetter Demolition (1992) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Kieswetter Demolition (1992) Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

0122-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Niagara 21st Group Inc. (Respondent)

Unit: "all construction labourers in the employ of Niagara 21st Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Niagara 21st Group Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0562-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Gillin Engineering and Construction Limited (Respondent) v. Carpenters' District Council of Ontario (Intervener)

Unit: "all construction labourers in the employ of Gillin Engineering and Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Gillin Engineering and Construction Limited in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1371-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. D.D.R. Landscape Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of D.D.R. Landscape Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of D.D.R. Landscape Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1707-08-R: Sheet Metal Workers' International Association, Local Union No. 47 (Applicant) v. Good Mechanical Contractors, a division of 524556 Ontario Inc. (Respondent)

Unit: "all sheet metal workers and sheet metal workers' apprentices in the employ of Good Mechanical Contractors, a division of 524556 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sheet metal workers and sheet metal workers' apprentices in the employ of Good Mechanical Contractors, a division of 524556 Ontario Inc. in all sectors of the construction industry in The City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit)

2814-08-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Fairway Custom Services Ltd. (Respondent)

Unit: "all construction labourers in the employ of Fairway Custom Services Ltd. in the industrial commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Fairway Custom Services Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

2882-08-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Astron Electric Limited (Respondent)

Unit: "all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Astron Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication cable installers in the employ of Astron Electric Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2894-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Starserra Homes and/or, Starserra (Humber River) Limited and/or, Starserra Homes (Gore Road) Limited and/or Starserra Homes Limited (Respondents)

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of Starserra Homes and/or Starserra (Humber River) Limited and/or Starserra Homes (Gore Road) Limited and/or Starserra Homes Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

2957-08-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. System International Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of System International Electric Inc. and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of System International Electric Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3012-08-R: Public Service Alliance of Canada (Applicant) v. Canadian Base Operators Inc. (Respondent)

Unit: "all employees of Canadian Base Operators Inc. at the Land Force Central Area Training Centre Meatford R.R. No. 1 in the Municipality of Meaford save and except managers, persons above the rank of manager, students employed during the school vacation period and persons covered by a subsisting collective agreement as of January 6, 2009

3018-08-R: The International Union of Painters and Allied Trades, Local Union 1590 (Applicant) v. Casey Brothers Painting & Decorating Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Casey Brothers Painting & Decorating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Casey Brothers Painting & Decorating Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3054-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rage Design Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Rage Design Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Rage Design Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

3069-08-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. Bogdan Tkach o/a B-Style Construction and/or B-Style and/or B-Style Concrete Group (Respondent)

Unit: "all rodmen and rodmen apprentices in the employ of Bogdan Tkach o/a B-Style Construction and/or B-Style and/or B-Style Concrete Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all rodmen and rodmen apprentices in the employ of Bogdan Tkach o/a B-Style Construction and/or B-Style and/or B-Style Concrete Group in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3104-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Merlin Restoration Ltd. and/or Merlin Family Homes and/or, Merlin Homes Ltd. (Respondents)

Unit: "all construction labourers in the employ of Merlin Restoration Ltd. and/or Merlin Family Homes and/or Merlin Homes Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to Vote

3399-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Jackson Roofing GTA Inc. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all employees (workers) [of Jackson Roofing GTA Inc.] who perform the work described in the clarity note below as well as the metalmen who perform the work described in the clarity note below excluding non-working foremen, hourly service men, flat roofers, aluminum/vinyl applicators, persons engaged in re-roofing, office, warehouse/shop workers, clerical workers and persons above the rank of foreman, engaged in the application of shingles and other roofing materials in new subdivision work (three or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basement) in the Province of Ontario, save and except the industrial, commercial and institutional sector. For additional clarity custom homes are excluded" (41 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	4

3545-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Donia Aluminum & Roofing Limited (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all employees (workers) [of Donia Aluminum & Roofing Limited] who perform the work described in the clarity note below as well as the metalmen who perform the work described in the clarity note below excluding non-working foremen, hourly service men, flat roofers, aluminum/vinyl applicators, persons engaged in re-roofing, office, warehouse/shop workers, clerical workers and persons above the rank of foreman, engaged in the application of shingles and other roofing materials in new subdivision work (three or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basement) in the Province of Ontario, save and except the industrial, commercial and institutional sector. For additional clarity custom homes are excluded" (32 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	15
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

0298-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited engaged in cleaning and building services employed at Brose Canada Inc., 1500 Max Brose Dr., London, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical, administrative, sales and engineering staff" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1446-08-R: Brick and Allied Craft Union of Canada (Applicant) v. Riverstone Masonry Inc. (Respondent) v. Trevor Lockyer, Derrick Van Den Berg, Nelson Gower, Jamie Rutter, J. Bruce Barclay, Jason Veldman and Mark Kleyn (Intervener)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Riverstone Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

1447-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Riverstone Masonry Inc. (Respondent) v. Brandon Rodwell, Justin Vanhevel, Shawn Norrie, Joe Yeoman, Justin McKay, Brady Becker and Joshua DeGraaf (Intervener)

Unit: "all construction labourers in the employ of Riverstone Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of Riverstone Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names .appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

2319-08-R: Teamsters Local Union No. 938 (Applicant) v. Brent Packaging & Logistics Ltd. (Respondent)

Unit: "all employees of Brent Packaging & Logistics Ltd. working in and out of 5491 Timberlea Blvd. in the City of Mississauga, in the Province of Ontario, save and except foremen and persons above the rank of foreman, students, sales, office and clerical staff." (49 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	0

2807-08-R: United Food & Commercial Workers, Local 206 (Applicant) v. Manga Hotels (Airport) Inc. operating as Hilton Garden Inn (Respondent)

Unit: "all employees of Manga Hotels (Airport) Inc. operating as Hilton Garden Inn employed at 3311 Caroga Drive, Mississauga, ON, save and except assistant managers, persons above the rank of assistant managers, front desk, office, and clerical" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2

Number of ballots segregated and not counted	0

2827-08-R: Ontario Nurses' Association (Applicant) v. Regina Gardens (Respondent)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by Regina Gardens, Hamilton, save and except the Assistant Director of Care and persons above the rank of Assistant Director of Care" (14 employees in unit) *(Having regard to the agreement of the parties.)(Clarity Note)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2834-08-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. AMC Entertainment International, Inc. (operating as AMC Theatres of Canada) (Respondent)

Unit: "all employees of AMC Entertainment International, Inc. (operating as AMC Theatres of Canada), employed at Courtney Park 16, 110 Courtney Park Drive East, in the City of Mississauga, save and except Operations Managers, Presentation Managers, Facilities and Maintenance Managers, and persons above the rank of Manager" (52 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	4

2837-08-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Niagara Falls Tourism Association (Respondent)

Unit: "all employees at Niagara Falls Tourism located in the City of Niagara Falls, Ontario, save and except Supervisors, those above the rank of Supervisor, Accountant, Executive Assistant, students and temporary workers" (11 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2868-08-R: Port Perry Employees Association (Applicant) v. Expercom Telecommunications Inc. (Respondent)

Unit: "all employees of Expercom Telecommunications Inc. in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foremen, office and clerical staff" (17 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2884-08-R: Ontario Public Service Employees Union (Applicant) v. Lee Manor Home for the Aged (Respondent) v. Health Care and Service Workers Union, Local 304 (CLAC) Affiliated with Christian Labour Association of Canada (Intervener) *(Having regard to the agreement of the parties.)*

Unit: "(a) all employees of Lee Manor Home for the Aged in Owen Sound regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor and office staff; and (b) all employees of Lee Manor Home for the Aged in Owen Sound, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period" (171 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	174
Number of persons who cast ballots	144
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	144
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	93
Number of ballots marked in favour of intervener	51
Number of ballots segregated and not counted	0

2958-08-R: Teamsters Canada Rail Conference (Applicant) v. Bombardier Transportation Canada Inc. and Bombardier Transportation North America (Respondent) v. Amalgamated Transit Union Local 1587 (Intervener)

Unit: "all employees of Bombardier Transportation Canada Inc. and Bombardier Transportation North America employed in the service, repair, and maintenance of trains at the Willowbrook facility, Toronto, Ontario, all train operators and customer service ambassadors related to the operation of Go Transit Commuter Rail Services, save and except supervisors, person above the rank of supervisor, office, clerical, sales staff and security guards" (201 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	317
Number of persons who cast ballots	248
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	242
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	216
Number of ballots marked in favour of intervener	27
Number of ballots segregated and not counted	4

3002-08-R: Ontario Secondary School Teachers' Federation (O.S.S.T.F) (Applicant) v. Wellington Catholic District School Board (Respondent)

Unit: "all permanent full-time Child and Youth Workers, Social Workers and Speech and Language Pathologists in the employ of the Wellington Catholic District School Board in the City of Guelph/County of Wellington, save and except employees for whom any trade union held bargaining rights on January 6, 2009" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3055-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Asbury Building Services Inc. (Respondent)

Unit: "all employees of Asbury Building Services Inc. employed at Chartwell Shopping Centre, 2301 Brimley Road, Scarborough, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (5 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

4237-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Swift Railroad Contractors Corporation (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0452-07-R: Sheet Metal Workers' International Associ Local 51 (Applicant) v. Aspen Aluminum Ltd. division of Klondike Vinyl Building Products Ltd. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all construction workers of Aspen Aluminum Ltd. division of Klondike Vinyl Building Products Ltd. engaged in new Residential subdivision Construction (defined as 3 or more units) in residential low-rise buildings (defined as non-elevated housing of not more than 4 storeys in height excluding basement) in the installation of aluminum and vinyl siding, eavestroughing, soffit and fascia, in the Province of Ontario, save and except the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, office and clerical staff." (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	9
Number of ballots segregated and not counted	15

0591-08-R: International Brotherhood of Electrical Workers (Applicant) v. Casino Rama Services Inc. (Respondent)

Unit: "all employees of the Facilities Project Management Department employed by Casino Rama Services Inc. in the Town of Rama, Ontario, save and except the Department Director and persons above the rank of Director." (36 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	3

2125-08-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 625 (Applicant) v. G.W. Clarke Drainage Contractors (Respondent)

Unit: "all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	4

2168-08-R: Labourers' International Union of North America, Local 527 (Applicant) v. Boucher Pre-cast Concrete Limited (Respondent)

Unit: "all employees of Boucher Pre-Cast Concrete Limited at or out of the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office clerical and sales staff" (26 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	8

2293-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) (Applicant) v. Advantage Engineering Inc (Respondent)

Unit: "all employees at Advantage Engineering located in the City of Chatham, Ontario, save and except office staff, supervisors and those above the rank of supervisor." (48 employees in unit)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	6

2536-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Serenity Spa, Hair and Cafe (Respondent)

Unit: "all employees of Serenity Spa, Hair and Café in the City of Kingston, save and except the spa manager and persons above the rank of spa manager and office administration staff." (23 employees in unit)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

2872-08-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Michaels of Canada Inc. (Respondent)

Unit: "all employees of Michaels of Canada Inc. Store No. 3926, located at 4339 Walker Road in the City of Windsor, save and except Assistant Managers and Managers and persons above the rank of Manager" (45 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	0

2955-08-R: United Food & Commercial Workers, Local 206 (Applicant) v. Easton's Toronto Airport Hotel (Caroga) LP o/a Fairfield Inn & Suites (Respondent) v. United Brotherhood of Retail Food Industrial and Service Trades International Union (Intervener)

Unit: "all employees of the Respondent Employer employed at 3299 Caroga Drive, Mississauga, ON, save and except assistant managers, persons above the rank of assistant managers, front desk, office and clerical staff maintenance staff and security guards" (32 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	15
Number of ballots segregated and not counted	2

2997-08-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Niagara 21st Group Inc. Marriott Fallsview- Niagara Falls (Respondent) v. Labourers' International Union of North America, Local 837 (Intervener)

Unit: "all employees at the Niagara 21st Group Inc. Marriott Fallsview located in the City of Niagara Falls, Ontario, save and except Supervisors, those above the rank of Supervisor, Banquet, Restaurant, Room Services and Kitchen Employees, Valet, Labour, Spa department, Reservation, AYS department, Tourism department, Star Bucks department, Gift Shop, Bellman, Doorman, Concierges department, IT Computer department, Room Renovation/Labour, Front Desk, Night Auditors, Sales, Conference Services, Office, Clerical Staff, agency workers and Security Staff, Marketing Staff and Receiving Staff." (106 employees in unit)

Number of names of persons on revised voters' list	106
Number of persons who cast ballots	96
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	95
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	60
Number of ballots segregated and not counted	0

2998-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada(CAW-Canada) (Applicant) v. 1367178 Ontario Inc. c.o.b. The Wynfield, The Westmount, The Woodhaven, The Waterford (Respondent) v. Ontario Federation of Health Care Workers, LIUNA Local 1110 (Intervener)

Unit: "all employees of 1367178 Ontario Inc. c.o.b. as The Wynfield - 451 Woodmount Drive in the City of Oshawa, Ontario; The Westmount - 200 David Bergey Drive in the City of Kitchener, Ontario; The Woodhaven - 380 Church Street in the City of Markham, Ontario; The Waterford – 2140 Baronwood Drive in the City of Oakville, Ontario, save and except supervisors and persons above the rank of supervisor, Nurse Managers, Educator, Co-ordinators, Registered and Graduate Nurses, Recreation Managers, Volunteer Co-ordinator, Maintenance, Office and Clerical staff" (696 employees in unit)

Number of names of persons on revised voters' list	837
Number of persons who cast ballots	491
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	489
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	158
Number of ballots marked in favour of intervener	326
Number of ballots segregated and not counted	2

3012-08-R: Public Service Alliance of Canada (Applicant) v. Canadian Base Operators Inc. (Respondent)

Unit: "all employees of Canadian Base Operators Inc. at the Land Force Central Area Training Centre Meaford, R.R. No.1 in the Municipality of Meaford save and except managers, persons above the rank of manager, students employed during the school vacation period and persons covered by a subsisting collective agreement as of January 6, 2009." (40 employees in unit)

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	70
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	25

3040-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Liberté Natural Foods Inc. (Respondent)

Unit: "all employees of Liberté Natural Foods Inc., employed as Drivers in the City of Brampton, Ontario, save and except supervisors, and persons above the rank of supervisor, field sales representatives, sales, office and clerical staff and employees covered by subsisting collective agreements" (28 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

1168-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Chamberlain Construction Services Limited, Chamberlain Architect Services Limited, Chamberlain Management Services Limited and Bostt Building Corporation Limited (Respondent)

2610-07-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Elite Construction Inc. and/or Andiel Homes Inc. (Respondent)

3168-07-R: Laurentian University Staff Union (Applicant) v. Northern Ontario School of Medicine (Respondent) v. Northern Ontario School of Medicine Faculty Association (Intervener)

2413-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. V.H.L. Developments (Markham Place) Inc. and,V.H.L. Developments Inc. (Respondents)

2484-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. Graham Bros. Construction Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1732-06-R; 1811-06-R; 2869-06-R: International Union of Painters and Allied Trades, Local 1795, The Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied

Trades, Local 557 (Applicants) v. The Cadillac Fairview Corporation Ltd.,CF/Realty Holdings Inc., Queenston Road Investment Inc., Eastgate Square Holdings Inc. and, Redcliff Realty Management Inc., Centre Mall Holdings Inc., and Kenilworth Avenue Investment Inc. (Respondents) *(Dismissed)*

3090-06-R: Laurentian University Staff Union (Applicant) v. Northern Ontario School of Medicine and, Laurentian University (Respondents) v. Laurentian University Faculty Association Northern Ontario School of Medicine Faculty Association (Interveners) *(Withdrawn)*

1382-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Chamberlain Construction Services Limited, Chamberlain Architect Services Limited, Chamberlain Management Services Limited and Bostt Building Corporation Limited (Respondent) *(Withdrawn)*

0661-08-R: Bricklayers, Mason Independent Union of Canada Local 1, Universal Workers Union, Labourers' International Union of North America Local 183 and Masonry Council of Unions Toronto and Vicinity (Applicant) v. 2130056 Ontario Inc. and/or Pillar General Contracting Ltd. (Respondents) *(Endorsed Settlement)*

1030-08-R: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Toronto Redi-Mix Limited Global Ready Mix Concrete Ltd. and Trivant Haulage Ltd. (Respondents) *(Withdrawn)*

1294-08-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Kearney Construction (Ontario) Ltd.,,C.G. Kearney Construction (Canada) Limited, (Respondents) *(Endorsed Settlement)*

2427-08-R: The United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Baun Construction Inc.,R. Baun Construction Inc.and,B & B Millwork Inc. (Respondents) *(Withdrawn)*

2556-08-R: United Food and Commercial Workers International Union Local 175 (Applicant) v.Orbis Canada Holdings Limited and,Norseman Plastics Holdings Limited (Respondents) *(Withdrawn)*

2999-08-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Kieswetter Demolition (1992) Inc.,Timeless Timber Structures Inc.,The Timeless Material Company Inc. (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

1732-06-R; 1811-06-R; 2869-06-R: International Union of Painters and Allied Trades, Local 1795, The Ontario Council of the International Union of Painters and Allied Trades and International Union of Painters and Allied Trades, Local 557 (Applicants) v. The Cadillac Fairview Corporation Ltd., CF/Realty Holdings Inc., Queenston Road Investment Inc., Eastgate Square Holdings Inc. and, Redcliff Realty Management Inc., Centre Mall Holdings Inc., and Kenilworth Avenue Investment Inc. (Respondents) *(Dismissed)*

3090-06-R: Laurentian University Staff Union (Applicant) v. Northern Ontario School of Medicine and, Laurentian University (Respondents) v. Laurentian University Faculty Association, Northern Ontario School of Medicine Faculty Association (Interveners) *(Withdrawn)*

1382-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Chamberlain Construction Services Limited, Chamberlain Architect Services Limited, Chamberlain Management Services Limited and Bostt Building Corporation Limited (Respondent) *(Withdrawn)*

0661-08-R: Bricklayers, Mason Independent Union of Canada Local 1, Universal Workers Union, Labourers' International Union of North America Local 183 and Masonry Council of Unions Toronto and Vicinity (Applicant) v. 2130056 Ontario Inc. and/or Pillar General Contracting Ltd. (Respondents) *(Endorsed Settlement)*

1030-08-R: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters (Applicant) v. Toronto Redi-Mix Limited Global Ready Mix Concrete Ltd. and, Trivant Haulage Ltd. (Respondents) *(Withdrawn)*

1294-08-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Kearney Construction (Ontario) Ltd.,,C.G. Kearney Construction (Canada) Limited, (Respondents) *(Endorsed Settlement)*

2427-08-R: The United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Baun Construction Inc., R. Baun Construction Inc. and, B & B Millwork Inc. (Respondents) *(Withdrawn)*

2556-08-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Orbis Canada Holdings Limited and, Norseman Plastics Holdings Limited (Respondents) *(Withdrawn)*

2999-08-R: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Kieswetter Demolition (1992) Inc., Timeless Timber Structures Inc., The Timeless Material Company Inc. (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1752-08-R: A. Wroz and a Group of Employees of Capital Tool & Design (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) v. Capital Tool & Design Limited (Intervener) *(Granted)*

Unit: "all employees of Capital Tool & Design Limited employed in the City of Vaughan, save and except supervisors and persons above the rank of supervisor, office and sales staff." (290 employees in unit)

2861-08-R: Brian Bockus & a group of employees of Grant Home Hardware (Applicant) v. Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Respondent) v. Grant Home Hardware & Building Centre (Intervener) *(Granted)*

Unit: "all employees of Grant Home Hardware Building Centre in the City of Temiskaming Shores, save and except Managers, Store Manager and office staff" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	19
Number of ballots segregated and not counted	0

2886-08-R: Fernando Ponte Jr. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Respondent) v. Renown Steel, A Division of Samuel, Son & Co., Limited (Intervener) *(Dismissed)*

Unit : "all employees of Renown Steel, A Division of Samuel, Son & Co., Limited in the city of Toronto save and except foreperson and persons above the rank of foreperson, office, clerical and sales staff and students employed during the school vacation period" (71 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	43
Number of ballots marked against respondent	21
Number of ballots segregated and not counted	0

3019-08-R; 3036-08-R: Rick Stevens and a Group of Employees of Hillenbrand Industries Canada Ltd. D.B.A. atesville Canada (Applicant) v. C.A.W. Local 462 (Respondent) v. Hillenbrand Industries Canada Ltd. d.b.a. Batesville Canada (Intervener) *(Dismissed) (Granted)*

3029-08-R: CUPE Members, Local 4619 (Applicant) v. CUPE Local 4619 (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0962-08-U: The Corporation of the City of London (Applicant) v. Canadian Union of Public Employees, Local 101 (Respondent) *(Withdrawn)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1511-06-U: Floorcraft Design Inc. (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Withdrawn)*

3598-06-U: Movlyn Jean-Pierre (Applicant) v. The Ottawa Carleton Public Employees Union (CUPE), Local 503 (Respondent) v. City of Ottawa (Intervener) *(Withdrawn)*

1265-07-U: IBEW Construction Council of Ontario (Applicant) v. Glenile Electric Ltd.,Andy Payne and Rick Figg (Respondents) *(Withdrawn)*

1287-07-U: Glenile Electric Ltd. (Applicant) v. IBEW Construction Council of Ontario (Respondent) *(Withdrawn)*

2729-07-U: Gui Xu (Applicant) v. Ontario Nurses' Association (Respondent) v. The Ottawa Hospital (Intervener) *(Withdrawn)*

3092-07-U: Limen Group Ltd. (Applicant) v. Metropolitan Industrial & Commercial Masonry Contractors Inc. and Ontario Masonry Contractors Association (Respondents) v. Masonry Industry Employers' Council of Ontario (Intervener) *(Dismissed)*

3451-07-U: Judy Burns (Applicant) v. The Canadian Union of Public Employees and its Local 2286.1 (Respondent) v. Winsor-Essex Children's Aid Society (Intervener) *(Withdrawn)*

3475-07-U: Inter-Cultural Neighbourhood Social Services (Applicant) v. Canadian Union of Public Employees (Respondent) *(Withdrawn)*

3537-07-U: Canadian Union of Public Employees and its Local 907 (Applicant) v. City of Belleville (Respondent) *(Dismissed)*

3663-07-U: John M. Naroski (Applicant) v. C.A.W. Local 195 (Respondent) v. ProvincialChrysler Ltd. (Intervener) *(Withdrawn)*

0081-08-U: Abela Berhanue (Applicant) v. Universal Workers Union L.I.U.N.A. Local 183 (Respondent) v. Metropolitan Toronto Condominium Corp. No. 638 (Intervener) *(Dismissed)*

0115-08-U: Labourers' International Union of North America Ontario Provincial District Council (Applicant) v. Kieswetter Demolition Inc., Kieswetter Demolition (1992) Inc., Timeless Timber Structures Inc., The Timeless Material Company Inc. (Respondents) *(Withdrawn)*

0264-08-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lab Construction Industries Inc. (Respondent) *(Withdrawn)*

0434-08-U: Jerry Schram (Applicant) v. Elementary Teachers' Federation of Ontario (Respondent) v. Avon Maitland District School Board (Intervener) *(Dismissed)*

0725-08-U: Brian Tweedie (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 2699-05 (Respondent) *(Dismissed)*

0737-08-U: Joyce Sinclair Powell (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) v. Cara Operations Limited carrying on business as Swiss Chalet Restaurant (Intervener) *(Endorsed Settlement)*

0828-08-U: Kevin Seth (Applicant) v. Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 264 (Respondent) v. Olivieri Foods Ltd., Canada Bread (Intervener) *(Dismissed)*

0870-08-U: Tammy Lynn Boddy (Applicant) v. CAW Local 195 (Respondent) *(Terminated)*

1044-08-U: Canadian Union of Public Employees Local Union No. 101 (Applicant) v. The Corporation of the City of London (Respondent) *(Withdrawn)*

1133-08-U: Labourers' International Union of North America, Ontario Provincial District Council(Applicant) v. TWD Roads Management Inc. (Respondent) *(Withdrawn)*

1208-08-U: Filomena Ricci (Applicant) v. Service Employees International Union, Local 1.on (Respondent) *(Terminated)*

1236-08-U: Canadian Union of Public Employees and its Local 3022 (Applicant) v. Almonte General Hospital and Fairview Manor Nursing Home (Respondent) *(Withdrawn)*

1448-08-U; 1449-08-U: Labourers' International Union of North America, Local 1059 and Brick and Allied Craft Union of Canada (Applicants) v. Riverstone Masonry Inc. (Respondent) *(Granted)*

1564-08-U: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Cloke-Kirby Construction Ltd. and, Marc Carter (Respondents) *(Withdrawn)*

1584-08-U: Phyllis Collins-Campeau (Applicant) v. Retail, Wholesale and Department Store Union (Respondent) v. Canlyte Inc. (Intervener) *(Withdrawn)*

1629-08-U: Gaetano Mininni (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) *(Terminated)*

1754-08-U: Edouard McLaughlin (Applicant) v. Construction & Allied Workers Local Union 607

1755-08-U: Sheet Metal Workers' International Association, Local Union No. 47 (Applicant) v. Good Mechanical Contractors, a division of 524556 Ontario Inc. (Respondent) *(Withdrawn)*

1805-08-U: International Union of Operating Engineers, Local 793 (Applicant) v. TWD Roads Management Inc. (Respondent) *(Withdrawn)*

1914-08-U: Aluminum Systems Inc. (Applicant) v. International Union of Partners and Allied Trades and the Ontario Council of the International Union of Painters and Allied Trades
(Respondent) *(Withdrawn)*

2131-08-U: Labourers' International Union of North America, Local 527 (Applicant) v. Boucher Pre-cast Concrete Limited (Respondent) *(Withdrawn)*

2143-08-U: James Sookraj (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and its Local 1000 and Mike Menicanin (Respondent) *(Dismissed)*

2174-08-U: Ontario English Catholic Teachers' Association (Applicant) v. Algonquin Lakeshore Catholic District School Board (Respondent) *(Withdrawn)*

2361-08-U: Marc Grandmaison (Applicant) v. Canadian Union of Public Employees Local 1623(Respondent) v. Hôpital Régional de Sudbury Regional Hospital (Intervener) *(Dismissed)*

2426-08-U: Veronica Larmond (Applicant) v. Service Employees International Union Local 1.ON ("SEIU") (Respondent) *(Terminated)*

2497-08-U: Brent Packaging & Logistics Ltd. (Applicant) v. Teamsters Local Union No. 938 (Respondent) *(Dismissed)*

2499-08-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Chartwell Seniors Housing REIT (Respondent) *(Withdrawn)*

2519-08-U: Brian Perrott, Paul Vodden, Kenneth Wagner, Ross Barnes (Applicant) v. Canadian Auto Workers (CAW) Union Local 1285 (Respondent) v. William Neilson Ltd./Ltee (Intervener) *(Withdrawn)*

2569-08-U: Christian Labour Association of Canada (Applicant) v. Ontario Patient Transfer (Respondent) *(Endorsed Settlement)*

2668-08-U: Michael Lind (Applicant) v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 873, Kirk Cheney and Bob Hall (Respondent) *(Dismissed)*

2694-08-U: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Children's Hospital of Eastern Ontario (Respondent) *(Withdrawn)*

2721-08-U: Ralph Halliday (Applicant) v. Local CUPE 79 (Respondent) v. City of Toronto (Intervener) *(Withdrawn)*

2741-08-U: Jamie Inkster (Applicant) v. Northern Employees Association (Respondent) v. John Anderson (Intervener) *(Withdrawn)*

2854-08-U: Suresh Persaud (Applicant) v. SEIU Local 2 Brewery, General and Professional Workers Union (Respondent) *(Terminated)*

2902-08-U: Elisha Brotton (Applicant) v. United Steel Workers of America (Respondent) *(Terminated)*

2916-08-U: Irene Psyllias (Applicant) v. Canada Employment and Immigration Union Jeannette Meunier McKay (Respondent) *(Dismissed)*

2918-08-U: Irene Psyllias (Applicant) v. CEIU Ontario Region, Jacqueline Wheway-Bacon ,Jan Liberty, Colleen Fagon (Respondents) *(Dismissed)*

2960-08-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Governing Council of the University of Toronto (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2167-08-M; 2544-08-M: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Weathertech Restoration Services Inc., Glen Bogart, Todd Bogart, Robert O'Neil and James Heskin (Respondent) *(Terminated)*

2932-08-M: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Industrial Performance Solutions Inc. c.o.b. as Abacus Electric (Respondent) *(Granted)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION

2797-08-M: The Wellington District School Board (Applicant) v. The Ontario Secondary School Teachers' Federation Representing District 18 - Educational Assistants (Respondent) *(Granted)*

2867-08-M: The Hamilton-Wentworth District School Board (Applicant) v. Ontario Secondary School Teachers Federation - English as a Second Language Instructors Bargaining Unit - District 21 (Respondent) *(Granted)*

3145-08-M: BA International Inc. (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

3210-05-JD: Labourers' International Union of North America and Labourers' International Union of North America, Local 837 (Applicant) v. International Union of Painters and Allied Trades, Local 205,Aecon Industrial, A Division of Aecon Construction Group Inc. (Respondents) v. Onyx Industrial Services Ltd. and, International Union of Operating Engineers, Local 793 (Interveners) *(Dismissed)*

1522-08-JD: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486 (Applicant) v. Labourers' International Union of North America, Local 493 and, Ellis-Don Construction Ltd. (Respondents) *(Granted)*

2124-08-JD: Greater Ontario Regional Council of Carpenters, Drywall & Allied Workers, Local 1946 (Applicant) v. Forma-Con Construction; and, Labourers' International Union of North America, Local 1059 (Respondents) *(Terminated)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2435-04-OH: Colleen Glynn (Applicant) v. City of Toronto - Water Department (Respondent) v. Toronto Civic Employees Union, Local 416 - CUPE (Intervener) *(Terminated)*

3162-07-OH: David G. Rowe (Applicant) v. Union Gas (Respondent) *(Withdrawn)*

2457-08-OH: Christopher Allan Butler (Applicant) v. Anchor Danly, Anchor Lamina Inc. Reliance Fabrications Division (Respondent) *(Withdrawn)*

2518-08-OH: Brad Marchand (Applicant) v. Can-Am Recycling Co. (Respondent) *(Withdrawn)*

2860-08-OH: Paul Douglas Ferguson (Applicant) v. Urban Images (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0835-05-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lab Construction Industries Inc., operating as Lab Flooring Industries (Respondent) *(Withdrawn)*

1528-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. Coopers' Crane Rental Limited (Respondent) *(Withdrawn)*

3947-06-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Cloke-Kirby Construction Ltd. (Respondent) *(Withdrawn)*

2517-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Horseshoe Valley Flooring Limited (Respondent) *(Withdrawn)*

0263-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lab Construction Industries Inc. (Respondent) *(Endorsed Settlement)*

1293-08-G: The United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Kearney Construction (Ontario) Ltd., C.G. Kearney Construction (Canada) Limited,(Respondents) *(Withdrawn)*

1392-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Guyan Group Inc. (Respondent) *(Withdrawn)*

2210-08-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. Jacques Lamont Ltée (Respondent) *(Endorsed Settlement)*

2388-08-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

2615-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gilles Larocque and Michel Cote c.o.b. as G & M Construction Co. (Respondent) *(Granted)*

2656-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Metro Drywall Contracting Ltd. (Respondent) *(Withdrawn)*

2710-08-G: International Union of Bricklayers and Allied Craftsmen, Local 2/Brick and Allied Craft Union of Canada Local 2 (Applicant) v. Alliance Masonry (2005) Ltd. (Respondent) *(Granted)*

2771-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. CY Rheault Construction Ltd. (Respondent) *(Endorsed Settlement)*

2777-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. KEM Khider Electro Mechanical (Respondent) *(Withdrawn)*

2788-08-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Major Glass Ltd. (Respondent) *(Withdrawn)*

2811-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Sherwood Windows Limited (Respondent) *(Terminated)*

2838-08-G: International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ararat Wall Systems and Stucco Ltd. (Respondent) *(Endorsed Settlement)*

2863-08-G: Drywall Acoustic Lathing and Insulation, Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadiana Contracting & Consulting Ltd. (Respondent) *(Withdrawn)*

2880-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mid North Excavating Ltd. (Respondent) *(Endorsed Settlement)*

2883-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Benmiller Construction Ltd (Respondent) *(Granted)*

2885-08-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Jack Godard c.o.b. as Floor-A-Teck (Respondent) *(Endorsed Settlement)*

2909-08-G: International Union of Bricklayers and Allied Craftsmen Local 2/Brick and Allied Craft Union of Canada Local 2 (Applicant) v. 938055 Ontario Inc. c.o.b. as Reftec (Respondent) *(Granted)*

2912-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Wasero Construction (1991) Ltd. (Respondent) *(Granted)*

2923-08-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Michael James McCullough c.o.b. as MNC Install (Respondent) *(Endorsed Settlement)*

2927-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tony's Carpentery Limited (Respondent)

2930-08-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Enviro-Core Inc. (Respondent) *(Withdrawn)*

2941-08-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners ofAmerica (Applicant) v. Alpa Wood Mouldings Inc./Home Lumber Inc. (Respondent) *(Withdrawn)*

2945-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Econo Excavating & Paving division of Tom-Con Inc. (Respondent) *(Granted)*

2949-08-G: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marina Park Resort Inc. (Respondent) *(Granted)*

2951-08-G; 2954-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Carica Construction Inc. and Terrastone Construction Inc. (Respondents) *(Endorsed Settlement)*

2971-08-G: Sheet Metal Workers' International Association Local 30 (Applicant) v. James Kemp Construction Limited (Respondent) *(Withdrawn)*

2972-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. SNC Lavalin (Respondent) *(Withdrawn)*

2973-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Lorcon 2000 Contracting Ltd. (Respondent) *(Granted)*

3007-08-G: Labourers' International Union of North America, Local 625 (Applicant) v. Coco Paving Inc. (Respondent) *(Terminated)*

3023-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Quanza Roofing Ltd. (Respondent) *(Granted)*

3024-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Total Mechanical Systems Limited (Respondent) *(Granted)*

3033-08-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ryan James Orr o/a Orrco Lighting & Electrical (Respondent) *(Granted)*

3074-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Terrastone Construction Inc. (Respondent) *(Granted)*

3088-08-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Grainger Glass Inc. (Respondent) *(Granted)*

3105-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. GTA Concrete Enterprises Ltd. *(Endorsed Settlement)*

3118-08-G: The International Union of Painters and Allied Trades, Local Union 200 (Applicant) v. Brisson Painting (Ottawa) Inc. (Respondent) *(Granted)*

3124-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Durocast Structural Group Inc. (Respondent) *(Endorsed Settlement)*

APPEALS - EMPLOYMENT STANDARDS ACT

2298-06-ES: Giuseppe Sergio (Applicant) v. S.M.K. Speedy International Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

0409-07-ES; 0410-07-ES: David Halpin (Applicant) v. Mari-Sophia Encarnacion, Ashleigh Leeson, and Director of Employment Standards (Respondents) *(Dismissed)*

2636-07-ES; 2637-07-ES: Tony & Elio Hair Centres Limited (Applicant) v. Hilda Dinorah, Duran Erlinda Nhan and, Director of Employment Standards (Respondents) *(Dismissed)*

3076-07-ES: Viktoria Golan (Applicant) v. Sparkling Distribution Inc. and, Director of Employment Standards (Respondents) *(Granted)*

3160-07-ES: William Urquhart, Director of 1311272 Ontario Inc. o/a Academy Towing (Applicant) v. Patricia Rouble and, Director of Employment Standards (Respondents) *(Dismissed)*

0748-08-ES: Nina Marsh-Ferguson (Applicant) v. Quinte Funeral Centres Limited o/a John R. BushFuneral Home and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0760-08-ES: Erlinda Delgado, a Director of 2050758 Ontario Inc. o/a Lady Lin (Applicant) v. Maryam Alaeddini, Ashley Bannister,Vijyagauri Bhuva,Luz Cardenas,Michael Clarke, Debby Dennis, Sa Fang, James Gibson, Arsenio Inocentes, Chali Nguyen, Luz Maria Ospina, Inga Salisny, Neil Stewart and, Director of Employment Standards (Respondents) *(Granted)*

1524-08-ES: Wanda McLeod-Yip (Applicant) v. Carl Zeiss Canada Limited and, Director of Employment Standards (Respondents) *(Withdrawn)*

1588-08-ES: Leonardo Graci, director of Summerhill Kitchens and Bathrooms Ltd. o/a Aquaworks Bathrooms & Kitchens (Applicant) v. Shirley De Guzman and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1853-08-ES: Wei Xuan Construction & Renovation Ltd. (Applicant) v. Guanghui Lou and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2051-08-ES: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge (Respondent) *(Terminated)*

2070-08-ES: Mark Giardine (Applicant) v. Halton District Catholic School Board and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2278-08-ES: Sidnei Lorencini (Applicant) v. Powerline Plus Ltd, Director of Employment Standards (Respondents) *(Dismissed)*

2288-08-ES: Dwight Willard (Applicant) v. Ontario Queen Shell and, Director of Employment Standards (Respondents) *(Withdrawn)*

2380-08-ES: Doug Anderson (Applicant) v. Skor Food Service ltd., and, Director of Employment Standards (Respondents) *(Terminated)*

2381-08-ES: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge and, Director of Employment Standards (Respondents) *(Terminated)*

2384-08-ES: Greenboro Lawn Care Inc. o/a Waterloo Golf Academy (Applicant) v. Dave Rudney and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2401-08-ES: Queensway Auto Parts (403491 Ontario Inc.) (Applicant) v. Richard Copeland and, Director of Employment Standards (Respondents) *(Dismissed)*

2414-08-ES: Robert Wroblewski (Applicant) v. Signs Outlet and Director of Employment Standards *(Endorsed Settlement)*

2415-08-ES: Hwasoon Hwang (Applicant) v. 1636914 Ontario Inc. o/a The Cinnamon Grove Cafe & Deli, Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

2554-08-ES: John B. Atkins (Applicant) v. Nova Machinery & Engineering Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2558-08-ES: Thornbury Grandview Farms Sales Ltd. (Applicant) v. Kenneth Church and, Director of Employment Standards (Respondents) *(Dismissed)*

2563-08-ES: Jose M. Costa (Applicant) v. Skilled Carpentry and, Director of Employment Standards (Respondents) *(Dismissed)*

2576-08-ES: Niagara River Hospitality Inc. (Applicant) v. Michelle Sadusek and, Director of Employment Standards (Respondents) *(Terminated)*

2582-08-ES: Matthew Quesenberry (Applicant) v. Stonefire Bar and Grill and, Director of Employment Standards (Respondents) *(Terminated)*

2590-08-ES: NCC Centre Inc. (Applicant) v. Sukhmandip Dhaliwal and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2598-08-ES: Niagara Sun Wholesale Distribution Inc. (Applicant) v. Nance Finkbeiner and Director of Employment Standards *(Endorsed Settlement)*

2606-08-ES: Iain Rousay (Applicant) v. National Money Mart Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

2609-08-ES: Hanrahan Youth Services Inc. o/a Hanrahan Youth Services (Applicant) v. Ted Horlor and, Director of Employment Standards (Respondents) *(Endorsed Settlement))*

2614-08-ES: Louise Thomas (Applicant) v. Spartan Solutions Inc and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2623-08-ES: Allan's Sandy Bay Surf "N" Turf Restaurant Inc. (Applicant) v. Tobin Small and, Director of Employment Standards (Respondents) *(Endorsed Settlement))*

2631-08-ES: Larry Inkster (Applicant) v. 955140 Ontario Inc. o/a Pickard Construction and, Director of Employment Standards (Respondents) *(Withdrawn)*

2636-08-ES: Mike Cro-An Auto Service (Applicant) v. David Visentin and Director of Employment Standards *(Endorsed Settlement)*

2663-08-ES: Williams Towing Service Ltd. (Applicant) v. Tammy Patterson and, Director of Employment Standards (Respondents) *(Dismissed)*

2666-08-ES: Frank Peng (Applicant) v. Burloak Engineered Solutions Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2689-08-ES: Mystique Event Marketing Incorporated (Applicant) v. Christopher Connor, and, Director of Employment Standards (Respondents) *(Terminated)*

2706-08-ES: 3499481 Canada Inc. o/a PJ's Pet Centres (Applicant) v. Jaime Moore, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2709-08-ES: Donal Carroll (Applicant) v. Alberto Culver Canada Inc. and Director of Employment Standards *(Endorsed Settlement)*

2751-08-ES: Apollo Health and Beauty Care (Applicant) v. Errol E. Rennie, Director of Employment Standards (Respondents) *(Withdrawn)*

2767-08-ES: 1762537 Ontario Inc. o/a Subway Sandwich (Applicant) v. May Umali and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2791-08-ES: Karen Hlady (Applicant) v. Thales Rail Signalling Solutions Inc., Director of Employment Standards (Respondents) *(Endorsed Settlement))*

2796-08-ES: Raymond William Weninger, Director of 1463909 Ontario Ltd. (Applicant) v. Sabrina Mastromattei and, Director of Employment Standards (Respondents) *(Terminated)*

2798-08-ES: Hellas Enterprises Limited o/a Comfort Inn Fallsview (Applicant) v. Paula Kelly, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2829-08-ES: 4062205 Canada Inc. o/a Lobby Lounge and Restaurant (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

2832-08-ES: Kelly Graff (Applicant) v. Sambuca Grill Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

2833-08-ES: Canadian Pardon Services (Applicant) v. Cherrell Williams, and, Director of Employment Standards (Respondents) *(Terminated)*

2857-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Joel Baskin and, Director of Employment Standards (Respondents) *(Terminated)*

2865-08-ES: Leopoldo Padilla Jimenez (Applicant) v. Mori Nursuries Limited, Director of Employment Standards (Respondents) *(Dismissed)*

2876-08-ES: International Source Transportation Inc. (Applicant) v. John Barnes and, Director of Employment Standards (Respondents) *(Dismissed)*

2887-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Amine Khouri and, Director of Employment Standards (Respondents) *(Terminated)*

2896-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Karine Beaumier and, Director of Employment Standards (Respondents) *(Terminated)*

2897-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Julia Croll and, Director of Employment Standards (Respondents) *(Terminated)*

2898-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Jill Lewis and, Director of Employment Standards (Respondents) *(Terminated)*

2899-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Mark Milloy and, Director of Employment Standards (Respondents) *(Terminated)*

2901-08-ES: Tom Schnarr, a Director of The Thirsty Toad (Applicant) v. Andre Robidoux and, Director of Employment Standards (Respondents) *(Terminated)*

2910-08-ES: Red Lobster (Applicant) v. and Director of Employment Standards (Respondent) *(Terminated)*

2963-08-ES: Pierre Laframboise (Applicant) v. Ménard Roof Trus Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

3178-08-ES: S.A.M. Electric (Applicant) v. Asadollah Moghaddamnejad, Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1223-08-HS: Geo. A Kelson Company Ltd. (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and, Goran Blanusa, Inspector (Respondents) *(Withdrawn)*

2259-08-HS: D'Orazio Infrastructure Group (Applicant) v. International Union of Operating Engineers (Local 793),Labourers International Union of North America (Local 837), Steven Papple, Inspector (Respondents) *(Withdrawn)*

2373-08-HS: Scan Electric Limited (Applicant) v. Andrew Carter, CHSP Inspector (Respondent) *(Withdrawn)*

2575-08-HS: Vale Inco Limited (Applicant) v. United Steelworkers of America Local 6500 and, Dan Beaulieu, Inspector (Respondents) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

1399-08-PS: Ontario Public Service Employees Union (Applicant) v. South Bruce Grey Health Centre, PT Health Inc. (Respondents) *(Withdrawn)*

REFERRAL FROM MINISTER (SEC. 3(2) HLDA)

2398-08-M: Canadian Union of Public Employees and its Local 2290 Sub (1) (Applicant) v. Fairfield Manor (Respondent) *(Granted)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3561-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135 (Applicant) v. National Steel Car Limited and, Universal Plasma Cutting Limited (Respondents) *(Granted)*

0893-07-R: IBEW Construction Council of Ontario (Applicant) v. Glenile Electric Ltd. (Respondent) v. Andrew Payne et al (Intervener) *(Withdrawn)*

0094-08-U: John Trombley (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada) and its Local 2098 (Respondent) *(Dismissed)*

0109-08-ES: Hans Harry derven Felix (Applicant) v. Bluegenesis.Com Corp. and, Director of Employment Standards (Respondents) *(Dismissed)*

0218-08-OH: Susan Hoesterey-Wilker (Applicant) v. FIO Automotive Canada Corporation (Respondent) *(Dismissed)*

0315-08-ES: Ali M. Saleh (Applicant) v. G4S Security Services (Canada) Ltd./G4S Services De Securite (Canada) Ltee. and,Director of Employment Standards (Respondents) *(Granted)*

0686-08-ES: Kwok Hung Cheng (Applicant) v. Viva Magnetics (Canada) Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

0827-08-U: Julie Desgrosseilliers (Applicant) v. Service Employees International Union (Respondent) v. North Bay General Hospital (Intervener) *(Dismissed)*

1088-08-U: Carol Labell-Mohanty (Applicant) v. Ontario Secondary School Teachers' Federation (OSSTF) (Respondent) *(Dismissed)*

1804-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Four Seasons Site Development Ltd. (Respondent) *(Dismissed)*

2106-08-ES: Mark Roberts (Applicant) v. Royal Lepage Parnters Ltd. and, Director of Employment Standards (Respondents) (Disposition not available)

2455-08-R: Dean Funston (Applicant) v. Service Employees International Union Local 2.on, Brewery, General & Professional Workers' Union (Respondent) *(Dismissed)*

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